88- 1779

No.

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

S.E. NICHOLS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD W. WAGMAN
GOLENBOCK AND BARELL
Attorneys for Petitioner
645 Fifth Avenue
New York, New York 10022
(212) 935-9800

ROBERT S. GOODMAN
CHARLES S. JOSEPH
Of Counsel

QUESTIONS PRESENTED

1. Did the court of appeals err as a matter of law when it enforced an order of the National Labor Relations Board which imposed a multi-site remedy—a remedy unprecedented in its scope, unjustified because unfair labor practices were charged at and impacted upon only one site, punitive in nature, and not designed to effectuate the purposes of the National Labor Relations Act?

2. Does the long-delayed grant of such multi-site and broad access remedies upon this record violate fundamental consititutional precepts of free speech, due process and equal protection of law?

3. Did the court of appeals err as a matter of law when upon this record it enforced a National Labor Relations Board order that was rendered six and one-half years after the decision of the Administrative Law Judge was submitted to the NLRB for review, and enforcement of the order was not sought for another ten months?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	19

TABLE OF CITATIONS

PAGE

Conair Corp. v. *NLRB*, 721 F.2d 1335 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984) 10

Decaturville Sportswear Co. v. *NLRB*, 406 F.2d 886 (6th Cir. 1969) 8, 9

DeProspero v. *S.E. Nichols, Inc.* (N.D.N.Y. 80 CV 467) ... 4

Dover Corp., Norris Division, 211 NLRB 955 (1974), *enforced on other issues*, 535 F.2d 1205 (10th Cir. 1976), *cert. denied*, 429 U.S. 978 (1976) 10

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203, 216 (1964) 6

Florida Steel Corp. v. *NLRB*, 620 F.2d 79 (5th Cir. 1980) 18

Florida Steel Corp. v. *NLRB*, 646 F.2d 616 (D.C. Cir. 1981) 9, 10

International Union of Electrical, Radio and Machine Workers, AFL-CIO v. *NLRB*, 383 F.2d 230 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968) 13

J.P. Stevens & Co., Inc. v. *NLRB*, 380 F.2d 292 (2d Cir. 1967) *cert. denied*, 389 U.S. 1005 (1968) ... 11, 12, 14

J.P. Stevens & Co., Inc. v. *NLRB*, 406 F.2d 1017 (4th Cir. 1968) 11

J.P. Stevens & Co., Inc. v. *NLRB*, 417 F.2d 533 (5th Cir. 1969) 8

Lewittes Furniture Enterprises, Inc., 244 NLRB 810 (1979) 10

MCI Telecommunications Corp. v. *F.C.C.*, 627 F.2d 322 (D.C. Cir. 1980) 18

NLRB v. *Babcox & Wilcox Co.*, 351 U.s. 105 (1956) 15

PAGE

NLRB v. *Bush Hog, Inc.*, 405 F.2d 755 (5th Cir. 1968) 13

NLRB v. *Delchamps, Inc.*, 92 LC ¶12,943 (5th Cir. 1981), *reh'g denied*, 660 F.2d 499 (5th Cir 1981) 8, 9

NLRB v. *Great Atlantic & Pacific Tea Co.*, 59 LC ¶13,327 (5th Cir. 1969) 8

NLRB v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92 (2d Cir. 1985) 17

NLRB v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), *reh'g denied*, 331 U.S. 868 (1947) 18

NLRB v. *Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966) 13

NLRB v. *Marion Rohr Corp., Inc.*, 714 F.2d 228 (2d Cir. 1983) 17

NLRB v. *National Casket Co. Inc.*, 107 F.2d 992, (2d Cir. 1939) 17

NLRB v. *Raytheon Co.*, 398 U.S. 25 (1970) 18

NLRB v. *Texas Electric Cooperatives, Inc., Treating Div.*, 398 F.2d 722 (5th Cir. 1968) 13

NLRB v. *T.W. Phillips Gas & Oil Co.*, 141 F.2d 304 (3d Cir. 1944) 8

NLRB v. *World Carpets of New York, Inc.*, 403 F.2d 408 (2d Cir. 1968) 17

Read's Inc., 228 NLRB 178 (1977) 10

*Republic Steel Corp.*v. *NLRB*, 311 U.S. 7, (1940) 17

Texas Gulf Sulphur Co. v. *NLRB*, 463 F.2d 778 (5th Cir. 1972) 8-9

Textile Workers Union of America, AFL-CIO v. *NLRB*, 338 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968) 11

PAGE

United Aircraft Corp. v. *NLRB*, 65 LC ¶11,576 (2d Cir. 1971) 8-9

United States v. *W.T. Grant Co.*, 345 U.S. 629 (1953) 18

William L. Bonnell Co., Inc., 170 NLRB 14 (1968), *enforced*, 405 F.2d 593 (5th Cir. 1969) 14

Wolverine World Wide, Inc., 243 NLRB 425 (1979) 10

Statutes:

National Labor Relations Act, Section 8(a) 3

National Labor Relations Act, Section 10(c) 2, 17

National Labor Relations Act, Section 10(j) 2, 4

No.

IN THE

Supreme Court of the United States

October Term, 1988

S.E. NICHOLS, INC.,

Petitioner,

–vs.–

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS — FOR THE SECOND CIRCUIT

Petitioner S.E. Nichols, Inc. ("Nichols" or the "Company") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 29, 1988 and January 3, 1989 respectively, enforcing an order of the National Labor Relations Board (the "NLRB" or "Board") entered against Nichols on June 30, 1987. The NLRB's order had affirmed a six and one-half year old decision of an Administrative Law Judge (the "ALJ") rendered December 31, 1980. The Board's petition for enforcement was not filed until April 21, 1988, ten months after the NLRB's order.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 862 F.2d 952 (2d Cir. 1988), and appears in the appendix hereto ("App.") at

1a. The judgment entered by the Clerk of the Court of Appeals appears at App. 1b. The opinion of the NLRB is reported at 284 NLRB no. 55 (1987) and appears at App. 1c. The December 31, 1980 decision of the ALJ appears at App. 1d. The July 8, 1980 decision of District Judge McCurn denying the Board's Section 10(j) petition for an injunction and the Second Circuit's February 18, 1981 affirmance of that decision appear at App. 1e and 1f, respectively.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on November 29, 1988 and January 3, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 10(c) of the Act, in pertinent part, provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

STATEMENT OF THE CASE

This petition brings to this Court for review a consolidated proceeding launched by respondent NLRB against petitioner Nichols. The consolidated proceedings resulted in the issuance of the ALJ's December 31, 1980 decision and the Board's decision and order (the "Order") rendered six and a half years later on June 30, 1987, affirming, with modification, the ALJ's decision

(App. 1c). Board Chairman Dotson dissented from the multi-site remedies ordered and "to the extent they [the Board] order *any* additions to the conventional remedies" (App. 6lc).

On April 20, 1988, almost ten (10) months later, the Board applied to the United States Court of Appeals for the Second Circuit for enforcement of the Order. Nichols answered and cross-petitioned. By decision dated November 29, 1988 and Judgment dated January 3, 1989, the Court of Appeals granted enforcement, with one modification, and denied Nichols' cross-petition (App. 1a).

UNDERLYING FACTS

Nichols, a New York corporation, owns and operates more than forty self-service, discount, retail department stores in ten states, including one store in Herkimer, New York. By order dated July 3, 1980, the ALJ, over Nichols' objection, consolidated two proceedings arising from events that occurred only at that store.

The first case involved allegations of unlawful discharges in September 1979 at the Herkimer store, and allegations that Nichols, at various meetings with employees at that store and in its company handbook, made statements and maintained rules allegedly in violation of Section 8(a) (1) of the act.

Prior to the rendering of a decision in the first case, the union filed new charges on April 7, 1980 and the Board issued a complaint in the second case on May 8, 1980 alleging that Nichols had violated (i) Section 8(a) (1) of the Act by interrogating two employees concerning testimony they were to give in the March 1980 hearing in the first case, (ii) Sections 8(a) (3) and (4) of the Act by disciplining or otherwise retaliating against three employees who had given testimony on behalf of the Board's Regional Director at the March hearing, and (iii) Section 8(a) (i) by interfering with em-

employees at the Herkimer store in the exercise of their rights to participate in or resort to Board processes.

After the complaint in the second case was issued, on June 13, 1980, the Regional Director petitioned in the United States District Court for the Northern District of New York, for an injunction pursuant to Section 10(j) of the Act with respect to the unfair labor practices alleged in the Board's complaint in the second case (*DeProspero* v. *S.E. Nichols, Inc.* (N.D.N.Y. 80 CV 467)). After a full hearing with testimony by ten witnesses on July 1, 2, 7 and 8, 1980, District Judge McCurn found that there was no reasonable cause to believe the alleged acts had taken place and refused to issue the requested injunction (App. 1e).[1] In its decision filed February 18, 1981, the Second Circuit affirmed, holding that injunctive relief was not warranted on the record (App. 1f).

On September 15, 1980, a hearing in the second case was held before the ALJ. The parties stipulated to have the record in that case consist of the same record that was made before Judge McCurn.

On December 31, 1980, the ALJ issued a decision in the consolidated proceedings which included a cease and desist order against Nichols and further required the Company to offer reinstatement to four employees, grant one employee a wage increase, provide these employees with back pay and remove certain warnings from employee files. In addition to these traditional remedies, the ALJ imposed a number of extraordinary requirements, including the posting of a notice in all 43 Nichols stores, the mailing of that notice to all employees at those stores, and the reading of that same notice during working time in each store by Nichols' president, Manfred Brecker ("Mr. Brecker"). Further, the ALJ required Nichols to provide extraordinary access for a period of two years to any interested union.

---

[1] In the meanwhile, an election was held at the Herkimer store in which the employees voted 47 to 9 against designating the union as their bargaining agent.

THE BOARD'S DECISION AND THE COURT OF APPEALS' AFFIRMANCE

After an unprecedented and unexplained delay of *six and one-half years*, the Board affirmed the ALJ's order, modifying it in regard to the breadth of the order. While the Board did not uphold the ALJ's imposition of a company-wide remedy, it did approve implementation of the ALJ's order with respect to eight stores.

The majority's decision to equate the breadth of the Board's sanctions with the breadth of the territory assigned to Nichols' district supervisor Henry Korcz ("Korcz"), was opposed by the Board's chairman. In a vigorous dissent against any multi-site remedies (App. 51c), Chairman Dotson parted company with the majority on the appropriateness of the breadth of the Board's sanctions, and he parted company with the majority "to the extent they order *any* additions to the conventional remedies" (App. 62c). Indeed, Chairman Dotson stated his belief that the prescribed remedy was the result of the Board's personal animus toward Mr. Brecker. "While the Respondent's impressions of the Board are unfortunate," he dissented, "we cannot allow them to serve as a justification for punishing the Respondent through punitive remedies that far outreach the specific violations herein" (App. 65c).

The Court of Appeals, in granting enforcement of the Board's Order, with one modification, reached several erroneous conclusions of law. While Nichols does not seek review of that portion of the Court of Appeals' decision which finds substantial evidence in the record to support the Board's determinations concerning the individual employees, Nichols does seek this Court's review of the Court of Appeals' affirmance of the Board's harsh and overbroad multi-site notice and access remedies which are punitive in nature and fail to "effectuate the policies of" the Act.

REASONS FOR GRANTING THE WRIT

I.

The Court Below Incorrectly Enforced The Board's Order Because The Board Abused Its Discretion In Fashioning Unwarranted, Overbroad Multi-Site Remedies To Be Imposed Upon Nichols

A. Introduction

Although the Board's remedial power "is a broad discretionary one, subject to limited judicial review," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), the Board has far exceeded the scope of its power. It has overstepped by leaps and bounds the limits of the remedial powers entrusted to it by the Act, and has, in essence, prescribed a punitive remedy. In an unconstitutional attempt to silence Brecker, the Board has imposed an unwarranted and unprecedented harsh remedy, and, in so doing, it has departed significantly from the remedies previously approved on review in the federal courts.

The federal courts which have considered the issue have carefully scrutinized the notice provisions of Board imposed remedies. Here, the issue concerns the appropriateness of the Board's broad application of posting, mailing and reading requirements. Cumulatively, the application of these remedies is unprecedented and punitive in nature.[2]

Although the Board cut back the multi-site remedies from a company-wide 43 stores to a district-wide eight stores in two non-

---

[2] The Court of Appeals, in its decision, seeks to justify affirmance of the extraordinary notice and access remedies by adopting the conclusion of the ALJ, reached in December of 1980, *seven and one-half years ago*, and of the Board in June 1987, that Mr. Brecker's alleged attack on the Board's neutrality poisoned the atmosphere (App. 46a, 47a). Aside from the fact that almost eight years later there has been a change in the employee staff and that the atmosphere is naturally no longer what it once was, the record does not warrant or support the extraordinary notice and access remedies that the Court of Appeals has affirmed.

contiguous states, as Chairman Dotson recognized in his well-reasoned dissent, there is no evidence that any alleged events at Herkimer had any impact at any other Nichols store (App. 63c-64c).

Moreover, when one considers that the remedy is based on a record in a consolidated case in which the record in one case was so unimpressive that a federal judge held there was no reasonable cause to believe that the alleged unfair labor practices had occurred, it is apparent that multi-site remedies are not justified.[3]

Furthermore, the Writ should be granted to enable this Court to consider the guidelines to be applied where long delayed Board action creates a harsh, unfair result. The Board took six and one-half years to rule on the ALJ's decision (and another ten months to seek enforcement). During that time there have been no unfair labor practice cases against Nichols; this is proof positive that the multi-site and extraordinary access remedies sought to be imposed by a split Board are inappropriate and not necessary to effectuate the purposes of the Act, and that their imposition would be punitive in nature. The Court below erroneously ignored the extraordinary, unprecedented delay by the Board in rendering the decision. The delay by itself undercuts any claim that extraordinary remedies are needed or warranted.

Under these circumstances, Nichols contends that enforcement of such remedies would be a denial of equal protection and denial of its due process right to a prompt administrative agency decision. Moreover, to apply remedies to sites where there has been no evidence of unfair labor practices is likewise a denial of due process.

---

[3] In addition, such broad remedies are inappropriate when the Board has admitted in proceedings before the NLRB in September 1980 that "the ultimate merits of the case may not be entirely free from doubt."

B. The Requirement Of A Divisionwide Posting And Mailing Is Unwarranted

The Board's Order requiring a district-wide posting and mailing of the prescribed notice is patently overbroad, unwarranted by the record and punitive. Thus, it is significant that Chairman Dotson stated:

> [T]he Board should not allow the use of a respondent's history of unlawful conduct as a per se justification for punitive remedies that do not specifically address the unfair labor practices found in a particular case. The majority's imposition herein of extraordinary remedies in all of the stores in Korcz' division represents just such a practice. Because in my view the record here does not support a finding that even divisionwide remedies are necessary to offset the coercive effects caused by the Respondent's conduct at issue in this proceeding, I would require only the conventional remedies detailed in the Order. (App. 65c-66c)

Although courts have accepted certain posting and mailing requirements, they have required broad orders to undergo strict scrutiny. Thus, the courts have required geographic proximity, *Texas Gulf Sulphur Co.* v. *NLRB*, 463 F.2d 778, 779 (5th Cir. 1972), the existence of a "close association" between groups of stores, *NLRB* v. *Delchamps, Inc.*, 92 LC ¶12,943 at p.18, 359 (5th Cir. 1981), *reh'g denied*, 660 F.2d 499 (5th Cir 1981), the existence of unfair labor practices at all or substantially all stores, *United Aircraft Corp.* v. *NLRB*, 65 LC ¶11,576 at p.20, 840 (2d Cir. 1971), "a system-wide and centrally coordinated movement to commit unfair labor practices," *Decaturville Sportswear Co.* v. *NLRB*, 406 F.2d 886, 889 (6th Cir. 1969), a substantial degree of notoriety of the employer's unfair labor practices, *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 59 LC ¶13,327 at p.23, 673 (5th Cir. 1969); *NLRB* v. *T.W. Phillips Gas & Oil Co.*, 141 F.2d 304, 306 (3d Cir. 1944), or the intention or existence of a "chilling effect" on labor relations at other locations. *J.P. Stevens & Co., Inc.* v. *NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).

In the present case, neither the ALJ nor the Board made findings on these issues. Indeed application of these criteria to the instant record compels a far less stringent remedy than that which the Board imposed and the Court of Appeals affirmed. First, the campaign activities by both sides in respect of the 1979 election at the Herkimer store were strictly limited to that store. Second, the eight Nichols stores covered by the Board's order are not well-suited to geographic classification. *See Texas Gulf Sulphur, supra.* Although they are all supervised by one man, most of the stores are remote from the others. Third, there is also no "close association" between the stores. *See Delchamps, supra.* There is no evidence that employees are ordinarily transferred between stores—indeed, they are not—or that there is a common bargaining unit within the group of named stores—which has never been the case.

Further, there was no finding of unfair labor practices at any of the stores in the division. *See United Aircraft, supra.* While the Board noted that unfair labor practices had at one time existed at two other stores in Korcz's division, those practices were not concurrent with the violations at bar, were unrelated to the Herkimer election, and provide no justification for the expansive remedy authorized by the Board and upheld on appeal. Certainly they do not constitute the system-wide action contemplated by the Sixth Circuit in *Decaturville, supra.*

Any justification for the remedy imposed by the Board and affirmed on appeal is also obviated by the absence of findings by either the Board or by the ALJ that any of the alleged violations became known outside of the stores in which they purportedly occurred or that they created a "chilling effect" at other locations. In this regard, *Florida Steel Corp.* v. *NLRB,* 646 F.2d 616 (D.C. Cir. 1981) is directly on point. In that case, the Court refused to accept the Board's conclusory statements and found that the Board failed to make the necessary findings, stating:

> [T]hat these corporate-wide remedies are necessary to offset coercive or chilling effects caused by the employer conduct

> at issue, even as that conduct is magnified by previous violation of the Act. The Board has not yet demonstrated that it is reasonably foreseeable that such effects have been produced on a corporate-wide basis.

Id. at 640.

The Court in *Florida Steel* applied this standard despite the long history of egregious behavior exhibited by Florida Steel, but absent here. Clearly, the standard enunciated in *Florida Steel* requiring the Board to demonstrate company-wide effect cannot be met in the instant case.

Although the remedy prescribed by the Board and affirmed by the Court of Appeals here is division-wide and not company-wide, the Board did not make findings regarding the necessity or appropriateness of a broad remedy. Following the compelling mandate of *Florida Steel*, the division-wide remedy should be overturned. Absent evidence that the unfair labor practices at Herkimer had any impact at any other store, any remedies must be limited to the one store involved in this matter. *See Read's Inc.*, 228 NLRB 178 (1977); *Dover Corp., Norris Division*, 211 NLRB 955 (1974), *enforced on other issues*, 535 F.2d 1205 (10th Cir. 1976), *cert. denied*, 429 U.S. 978 (1976).

The NLRB itself has seen fit to apply the *Florida Steel* standards. In *Conair Corp.* v. *NLRB*, 721 F.2d 1335 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984), the Circuit Court upheld the Board's remedy which was limited to the plant in which the unfair labor practice violations took place despite its findings that Conair's violations of the labor law were "outrageous and pervasive" and prescribed an otherwise extraordinary remedy. *Id.* at 1384-85. Moreover, in *Lewittes Furniture Enterprises, Inc.*, 244 NLRB 810 (1979), the Board required posting at only one plant in Taylorsville, North Carolina, despite the presence of another plant in the same town, and in *Wolverine World Wide, Inc.*, 243 NLRB 425 (1979) the Board required posting at only one plant despite the presence of other plants in the state of Michigan and a long history by the employer of unfair practices.

Notwithstanding these well-reasoned precedents, the Board at bar—six and one-half years after the matter was submitted to the Board for decision—vindictively applied the Second Circuit's reasoning in the *J.P. Stevens* cases, which is wholly inapposite to this record. As Chairman Dotson stated in his vigorous dissent, "[t]o compare [Nichols'] unfortunate but limited history of unfair labor practices to the widespread and pervasive practices engaged in by J.P. Stevens defies common sense" (App. 64c).

The instant case is not appropriate for implementation of the remedies propounded in *J.P. Stevens*, where, unlike here, there were large scale, broad-based violations of the Act. *J.P. Stevens & Co., Inc.* v. *NLRB* ("Stevens I"), 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (1968), involved the discharge of employees in 20 of 43 plants in two states. *Textile Workers Union of America, AFL-CIO* v. *NLRB* ("Stevens II"), 338 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968), involved *18 discharges* in the same plants as in *Stevens I. J.P. Stevens & Co., Inc.* v. *NLRB* ("Stevens III and IV"), 406 F.2d 1017 (4th Cir. 1968) involved discrimination against *20 employees* in *five plants.* In stark contrast, Nichols was found to have committed unfair labor practices in respect of a few individuals, in only *one* store. Even the Board's majority decision recognized the vast distinction between *J.P. Stevens* and Nichols, stating:

> The massive multiplant violations by J.P. Stevens are not parallel to S.E. Nichol's [sic] history, which involves a smaller number of proceedings, *each restricted to one facility.*

(Emphasis supplied) (App. 34c).

Thus, the *J.P. Stevens* cases are readily distinguishable by the number and degree of the violations. Further, the Court in *Stevens I* relied on the fact that the area in which the plants were located "is geographically limited and contiguous." Here, on the other hand, a geographical underpinning for the Board's broad remedy is far more tenuous. It is also important that the Court in *Stevens I* relied on the Board's finding "that the Company's prac-

tices were 'so extensive and so well publicized that they must inevitably have had a coercive impact' at the remaining plants." *Stevens I*, 380 F.2d at 304. At bar, however, the Board failed to acknowledge the geographic separateness of the store locations and made no findings that the alleged violations had any effect at other locations. Indeed, the Board admitted that the prior Nichols cases were each restricted to one facility (App. 34c).

Given the factual differences between the *J.P. Stevens* cases and the instant case, it is clear that the Court erred in finding that the Board did not abuse its discretion in prescribing its unwarranted and unprecedented remedy. The Board's failure to make the requisite findings as to the effect of the violations, coupled with the inconsistency of the decision with its own precedents, make it apparent that the Board has capriciously extended the breadth of its remedies in order to, as Board Chairman Dotson wrote, justify "punishing the respondent" (App. 65c). As such, the Court of Appeals' affirmance of the Board's posting and mailing remedies must be modified to eliminate their punitive nature and to make them accord with the precedents of the Board and the federal courts.

The Court should grant certiorari to review and limit the application of the *J.P. Stevens* cases, thereby establishing appropriate guidelines for remedies, and limiting any remedies to those which are warranted by the evidentiary record and necessary to effectuate the policies of the Act. Thus, certiorari is appropriate to review the Board's decision-making process, and to enunciate the requirement that the record before the Board must contain evidence to support findings that justify multi-site and extraordinary access remedies.

C. The Court Of Appeals Erred In Finding That The Board Did Not Abuse Its Discretion In Imposing A Notice Reading Requirement

Because the permissible scope of notice reading requirements has been significantly narrower than the permissible scope

of posting and mailing of notices, the Board's notice reading requirement is even more extraordinary than its posting and mailing requirement.

Historically, the Board and the courts have been wary of requiring the reading of remedial notices. The early federal cases upholding the validity of a reading requirement reasoned that a reading of the notice was required to insure the notice's full dissemination. These decisions relied on the illiteracy of the workers receiving notice as a justification for requiring a reading. *See, e.g., NLRB* v. *Texas Electric Cooperatives, Inc., Treating Div.*, 398 F.2d 722, 726 (5th Cir. 1968); *NLRB* v. *Bush Hog, Inc.*, 405 F.2d 755, 758 (5th Cir. 1968). Moreover, courts have found that a reading requirement "is unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *NLRB* v. *Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966); *see also International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *NLRB*, 383 F.2d 230, 233 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

While the Court of Appeals enforced the reading requirement of the Order only at the Herkimer store, and gave Nichols the option of having the notice read by a Board representative, the remedy remains unduly harsh and punitive, and particularly inappropriate in view of the long delay. The remedy may undermine the harmonious relationship that has existed for eight years. Under these circumstances where the remedy may adversely affect relations between labor and management, it must, therefore, be vacated.

D. The Court Of Appeals Erred In Finding That The Board Did Not Abuse Its Discretion In Granting To Unknown Unions *In Futuro* Access To Company Bulletin Boards And Company Premises

Those parts of the judgment which grant unions access to Company bulletin boards and access to Company premises to attend or give speeches, are wholly inappropriate. With respect to

bulletin boards, this proposed provision is unwarranted for three reasons. First, the campaign at Herkimer was not a campaign where the Union did not have sufficient access to employees. Second, there is no ongoing campaign situation; the campaign ended in 1980 when the employees voted 47 to 9 against the Union and the election results were certified without objection. It is a stipulated fact that there are no union organizational campaigns occurring at any other Nichols store, in Korcz' district or elsewhere. There is thus no justification for campaign related remedies. Third, since there is no proof of Company use of bulletin boards in a campaign, the proposed remedy is not proper since union use of bulletin boards is not necessary. *Stevens I*, 380 F.2d at 305.

The unions have easy access to employees, as evidenced by the employee meetings which were held by the Union in respect of the Herkimer store and by the Union's continual correspondence to employees. There is thus no need or justification for extending to unions the extraordinary privilege to come on Company property to post notices. Absent communications problems with employees, union access to company bulletin boards is not warranted. *William L. Bonnell Co., Inc.*, 170 NLRB 14 (1968), *enforced*, 405 F.2d 593 (5th Cir. 1969). The judgment is all the more heinous in this respect since it would grant the unions access to bulletin boards even in the absence of a union organizational campaign.

The ALJ's reasoning in support of this provision is unpersuasive. The ALJ argues that Nichols has "improperly used its available arenas of communication unlawfully" and had "available convenient, inexpensive means of communicating with its employees" (App. 257d). There is, however, no proof in the record, and no finding by the ALJ or the Board, that the Union did not likewise have available convenient, inexpensive means of communicating with the employees. The Union did not make such a claim. Barring such a showing, there is no justification for the granting of access to unions to Company bulletin boards.

The requirements that Nichols permit union agents on Company premises to be present at the making of speeches by Company representatives and to have the right to make speeches themselves on Company premises, are similarly unnecessary and inappropriate given the absence of any charges or findings of lack of union access to employees. In fact, the record below showed that the Union at the Herkimer store held a meeting with employees at an available meeting hall, and that the complaining witnesses in the second case were in constant personal communication with the Union. There was also a steady stream of Union correspondence sent to employees. Accordingly, there is no reason to require the Company to allow union representatives on Company premises with respect to speeches.

The Supreme Court has held:

> It [the Act] does not require that the employer permit the use of its facilities for organization when other means are readily available.

NLRB v. *Babcox & Wilcox Co.*, 351 U.S. 105, 114 (1956).

This principle is conclusive at bar. To permit union agents to make speeches on company property when unions have other, easy access to employees is to improperly promote and facilitate unionization of a company. To be fair, if the Court's remedy is upheld, the employer should also have the right to attend meetings called by unions for the purpose of there presenting the employer's views. Otherwise, the employee will be able to attend some meetings at which the union alone may speak and no meetings at which the Company alone may speak. The inherent unfairness of this and the unbalanced and improper effect it can have on an employee in the exercise of Section 7 rights is obvious. The statutory policy of encouraging collective bargaining, protecting employee freedom of associations, and self-organization (29 U.S.C. §151) is not met when the government injects its presence onto the scene and gives its imprimatur to the union's organizational activity. Excessive, overbroad remedies create that

impression and go beyond the protection of employee freedom of choice and association and in fact, encourage or influence a choice.

Moreover, such access by union representatives as the judgment requires is constitutionally defective. Nichols is a discount department store which is open for the purpose of selling goods to the public. It permits on its premises those persons who wish to purchase its merchandise and certain governmental representatives. It is under no obligation to permit any other persons on its premises. The judgment provides for union representatives to be on Company property for a purpose for which they would normally have no right or business to be there. The extension of such a right to union business representatives without a strong and overwhelming public purpose, becomes an unconstitutional, impermissible deprivation of a property right.

II.

The Court Below Incorrectly Enforced The Board's Order Because The Board Inordinately Delayed In Rendering A Decision Which Is Now Moot

Although the Court below explicitly stated that it was "troubled" by the Board's six and one-half year delay in rendering a decision (App. 55a), the Court nevertheless stated that this delay did not provide "a justification in this case for refusing to enforce an order designed to ensure the company's employees the right to participate freely in union activities" (App. 55a). As noted above, here, for a variety of readily apparent reasons, the Board's remedies are not necessary to effectuate the policies of the Act—indeed overly broad, long delayed remedies will destroy the balancing of interests and harmony promoted by the Act. Since there have not been any charges against Nichols in the more than eight years since the ALJ's decision, the judgment below is unwarranted.

The Court below erred in enforcing the Board's Order because of the inexcusable and inexplicable delay by the Board in

deciding whether to affirm the ALJ's decision. *See, e.g., NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92, 101 (2d Cir. 1985) (Second Circuit denied enforcement of bargaining order where four years passed since the charges were filed against the employer, and more than two and one-half years elapsed since the hearings on those charges closed); *NLRB* v. *Marion Rohr Corp., Inc.*, 714 F.2d 228, 232 (2d Cir. 1983) (Second Circuit denied enforcement of bargaining order where, like *J. Coty*, four years elapsed since the charges against the employer were filed, and more than two and one-half years had passed since the hearings on those charges were held); *see also NLRB* v. *National Casket Co. Inc.*, 107 F.2d 992, 995 (2d Cir. 1939) ("When a complaint involves the granting of affirmative relief against an employer, it is particularly desirable that the case be prosecuted to conclusion with as much expedition as is reasonably practicable, for any unnecessary delay results in obvious hardship to the employer, since the longer the delay the larger the sum he must pay for work never performed, if the order requires reinstatement of employees with back pay.") *Id.* at 995.[4]

Here, the Board inexplicably did not render a decision for over *six and one-half years* after the ALJ's decision. The Court should take judicial notice of the fact that during the *entire* period, and continuing to date, not a *single* unfair labor charge has been filed against Nichols. This fact is crucial in light of the strict policy of the Act, 29 U.S.C. §160(c); *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10-12 (1940). For a proposed remedy to stand, it must, under Section 10(c) of the Act, "effectuate the policies of [the Act]." 29 U.S.C. §160(c). If it is, instead, an attempt to be vindictive and

---

[4] The Court of Appeals also erred by granting the Board's application after the Board delayed over eight months in seeking enforcement of its Order. See, *e.g., NLRB* v. *World Carpets of New York, Inc.*, 403 F.2d 408, 409 (2d Cir. 1968). (Where the Board waited more than a year after rendering a decision before seeking enforcement, the Second Circuit instructed that "[s]uch unexplained delay is inimical to the proper administration of the National Labor Relations Act.")

nonremedial and is not based upon the conduct alleged in the pending proceeding, it will not be enforced. *Florida Steel Corp.* v. *NLRB*, 620 F.2d 79, 82 (5th Cir. 1980).

In *MCI Telecommunications Corp.* v. *F.C.C.*, 627 F.2d 322 (D.C. Cir. 1980), Circuit Judge Wald, writing for the Court, reasoned:

> Many of the same considerations that impel judicial protection of the right to a speedy trial in criminal cases or implementation of civil decrees with all deliberate speed are not inapposite in agency deliberations. Those situations generally involve protection of constitutional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires.

Id. at 341

The same reasoning is applicable to the present record. After the excessive, unexplained delay in rendering a decision, the harmonious labor relations present for the past eight years can only be disrupted by a reawakening of former conflicts or differences.

In this respect, it is significant that an NLRB enforcement action is mooted, where, as here, a party can establish that there is no reasonable expectation that the wrong will be repeated. *NLRB* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970) (Enforcement proceeding held not moot since, unlike this action, there was no indication that specific acts complained of had not been repeated or may not be repeated in the future). *See also United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947), *reh'g denied*, 331 U.S. 868 (1947).

Where there have been no unfair labor practice charges filed against Nichols for more than an eight year period, a remedy which seeks to impose the broad, unprecedented sanctions at issue before this Court can hardly effectuate the policies of the Act. To the contrary, such a remedy will serve only to punish Nichols

and stir labor unrest where harmonious labor relations have existed for more than eight years.

As a final gauge of the vast overbreadth of the Court's judgment, it is significant to note that upon review of the ALJ's findings, the Board found that Nichols neither: (1) directed or advised employees not to sign union authorization cards or any papers other than pay receipts, nor (2) promulgated, maintained, or enforced any rule prohibiting employees from soliciting or distributing written materials on behalf of any labor organization during working time. Incredibly, however, the Board saw fit to impose a remedy compelling Nichols to cease and desist from each of these activities in which the Board *itself* found Nichols not to be engaging (App. 36c-41c). That the Court of Appeals permitted the Board to overstep its bounds on these two matters merely highlights the appropriateness of review by this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a Writ of Certiorari be granted in order to provide the Court with the opportunity afforded by this the record to establish appropriate constitutional standards for the review of long-delayed, overly broad remedial orders of the NLRB; standards that comport with constitutional principles of free speech, due process and equal protection of the law.

Dated: New York, New York
April 3, 1989

Respectfully submitted,

LEONARD W. WAGMAN
GOLENBOCK AND BARELL
Attorneys for Petitioner
645 Fifth Avenue
New York, New York 10022
(212) 935-9800

Of Counsel:
Robert S. Goodman
Charles S. Joseph

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1779

No. —

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

S.E. NICHOLS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD W. WAGMAN
GOLENBOCK AND BARELL
Attorneys for Petitioner
645 Fifth Avenue
New York, New York 10022
(212) 935-9800

ROBERT S. GOODMAN
CHARLES S. JOSEPH
Of Counsel

TABLE OF CONTENTS

	Page
Opinion, dated November 29, 1988, of the United States Court of Appeals Second Circuit [862 F.2d 952 (2d Cir. 1988)].....	1a
Judgment, dated January 3, 1989, of the United States Court of Appeals Second Circuit.....	1b
Decision and Order, dated June 30, 1987, Affirming Decision of Administrative Law Judge Josephine H. Klein, National Labor Relations Board [284 N.L.R.B. No. 55 (1987)].....	1c
Decision, dated December 31, 1980, of Administrative Law Judge Josephine H. Klein, National Labor Relations Board.....	1d
Decision, dated July 8, 1980, Denying the Board's Section 10(j) Petition for an Injunction.....	1e
Order, dated February 18, 1981, Affirming the District Court's July 8, 1980 Decision.....	1f
List of Parties.....	1g

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 137, 275 August Term 1988

Argued: October 4, 1988 Decided: November 29, 1988

Docket Nos. 88-4057, 88-4087

----------x

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

- against -

S.E. NICHOLS, INC.,

Respondent-Cross-Petitioner.

----------x

Before: FEINBERG, Chief Judge, NEWMAN and GARTH,* Circuit Judges.

Petition of National Labor Relations Board for enforcement of, and cross-petition of respondent to vacate, order requiring employer to cease and

desist unfair labor practices and to take various affirmative steps necessary to effectuate the policies of the National Labor Relations Act.

Order enforced with one modification; cross-petition denied.

LEONARD W. WAGMAN, New York, NY (Golenbock and Barell, Robert S. Goodman, Charles S. Joseph, of Counsel), for Respondent.

WILLIAM A. BAUDLER, National Labor Relations Board, Washington, DC (Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Susan L. Williams, Supervisory Attorney, National Labor Relations Board, Washington, D.C. of Counsel), for Petitioner.

FEINBERG, Chief Judge:

The National Labor Relations Board applies for enforcement of its order against S.E. Nichols, Inc., and Nichols cross-petitions to vacate the Board's order. The Board found that Nichols had violated section 8(a)(1), (3) and (4) of the National Labor Relations Act by, among other things, discharging four union activists and otherwise coercing employees, harassing employees on account of their participation in Board proceedings and discriminating against them in their terms of employment. To remedy these violations, the Board fashioned an expansion of its traditional remedies, including a broad set of affirmative requirements. Nichols objects to almost all of the Board's

findings of violations, the breadth and severity of its proposed remedy and the consolidation of two complaints by the Administrative Law Judge (ALJ). With one modification, we enforce the Board's order.

I. Background

The petitions before us are occasioned by a bitter labor dispute in upstate New York. The following summary of the facts is based upon the Board's findings. Nichols, which we sometimes refer to hereafter as "the company," operates in many states a chain of 43 self-service discount retail department stores. The company has a long history[1/] of using unlawful means to resist unionization at its stores, and this controversy arises out of efforts between

August 1979 and June 1980 to unionize its store in Herkimer, New York. At the time, the store had approximately 70 employees.

In August 1979, Dorothy Reinhardt and Doug Vincent, two Herkimer employees, began discussing the need for a union at the Herkimer store. On August 31, Reinhardt and Vincent contacted two representatives of the Retail Store Employee's Union Local 345, United Food and Commercial Worker's International Union, AFL-CIO, hereafter referred to as "the union,"[2/] and received blank union authorization cards to give to their fellow employees.

Earlier that day, Denise Styles and Kristin Burkle, two security employees, began to organize a walkout in

protest over a changed work schedule, which increased the number of hours and days to be worked each week. They were dissuaded from this course of action by Reinhardt, and they agreed to join the incipient union organization. By September 2, Reinhardt, Vincent and Styles had obtained about 27 signed union authorization cards. By September 7, the union petitioned for a representation election.

Henry Korcz, the company's supervisor of the district in which the Herkimer store is located, knew of the growing union sentiment at Herkimer by September 2, at the very latest, and immediately visited the store. Concurrent with his arrival, management began vigilant observation of the areas in

which Reinhardt and Vincent worked. On September 3, Korcz summarily fired both Reinhardt and Vincent with previously prepared pay checks. The store manager, Robert Hathorn, then dismissed Burkle and Styles in the same manner the following day. On September 4, Korcz received a mailgram from the union claiming that it represented a majority of the company's employees. In response to the unionization efforts, Korcz held a series of meetings with employees in which management aggressively lobbied against unionizing the store. In one of these meetings, as the ALJ noted,

> Korcz was asked if the four discriminatees would be reinstated, to which he answered: "[Y]es, but once they're reinstated, they don't last too long"; in other words, pretexts would be found for their later discharge.

On September 7, the union filed unfair labor practice charges, claiming that the discharges of the union activists, Korcz's tactics at the meetings with employees and a company rule restricting the acceptance of literature on company property all violated the Act. A complaint issued in October 1979, and was tried as case No. 3-CA-9304 before the ALJ in March 1980. The ALJ heard evidence from 15 witnesses over a three-day period.

Employees Fred Pumilio, June Klimacek, and Margaret Goldsmith testified against the company at the hearing before the ALJ. Shortly thereafter, the three employees were subjected to increased scrutiny and harassment by the store's management.

Pumilio and Klimacek were given written warnings about their behavior, and Goldsmith was not granted a promised raise. Manfred Brecker, the president of the company, told her to "ask the Union to give [her] a raise."

In the months following the March unfair labor practice hearing, the top offices of the company, including president Brecker and district supervisor Korcz, continued their aggressive campaign against the unionization of the Herkimer store. Brecker, whose office was in New York City, paid three unusual visits to the Herkimer store in April and June, and held meetings with both small and large groups of employees to discourage them from supporting the union. In these meetings, Brecker, among

other things, embarrassed Pumilio, Klimacek and Goldsmith by ridiculing their complaints about management and said that "hell would have to freeze over before [Reinhardt, Vincent, Burkle and Styles] would get hired again." Brecker also said that when those dismissed because of union activities "do come back they don't last long because people don't get along with them and I consider them troublemakers and they leave."

This post-hearing harassment and coercion gave rise to another unfair labor practice charge. A second complaint, 3-CA-9714, issued in May 1980, and was amended in June and September. This complaint, as amended, alleged that on various occasions between March and

June 1980, the company violated the Act at its Herkimer store.

In June 1980, an election was held pursuant to the union representation petition that had been filed in September 1979. The union lost the election, and no objection was filed.

On July 3, 1980, the ALJ granted the motion of the Board's General Counsel to reopen the record and to consolidate case 3-CA-9714 with the first complaint, case 3-CA-9304, arising out of the same union campaign. The ALJ scheduled a new hearing in September 1980. Meanwhile, the Board's Regional Director had filed a petition in the United States District Court for the Northern District of New York, pursuant to section 10(j) of the Labor Management Relations Act, 29 U.S.C.

§ 160(j), for a temporary injunction against the company's unfair labor practices pending hearing and decision in the case before the Board. On July 8, 1980, Judge Neal McCurn denied the application. The denial was affirmed by order of this court in February 1981, in which, however, we expressed doubt over whether the district court "applied too strict a standard" and made clear that the affirmance was not "in any way intended to prejudge the pending Labor Board proceeding or any future court action brought in respect thereto."

The consolidated cases were heard by ALJ Klein in September 1980. At the hearing, the parties stipulated that the record of the section 10(j) proceeding be used in lieu of testimony on the charges

covered by the second complaint. The ALJ issued a lengthy opinion in December 1980, finding Nichols in violation of § 8(a)(1), (3) and (4) of the Act and ordering expansive remedies against the Company.

In June 1987, a three-member panel of the Board affirmed the ALJ's rulings, findings and conclusions with certain modifications and limited the recommended remedies in certain respects.3/ One member dissented in part and would have further limited the ALJ's decision. The Board agreed with the ALJ that the company violated § 8(a)(1) and (3) of the Act by dismissing Reinhardt, Vincent, Styles and Burkle and by refusing to offer them reinstatement. The Board accepted most of the ALJ's findings that

the company had committed numerous violations of § 8(a)(1) in its aggressive resistance to the Union. The Board also accepted the ALJ's findings that the company violated § 8(a)(1), (3) and (4) of the act by giving written warnings to Pumilio and Klimacek, by withholding a raise to Goldsmith, and by subjecting the three employees to ridicule, increased supervision and unfavorable working conditions.

The Board curtailed slightly the breadth of the measures fashioned by the ALJ to remedy the company's unfair labor practices. The Board's affirmative remedies required the company, among other things, to give a union, under specified conditions, access to company bulletin boards, notice of, and access

to, management speeches regarding unionization, and access to the employees in order to give a 30-minute pre-election speech; to undertake a posting and mailing of a "Notice to Employees;" and to have president Brecker read the notice to all employees in the district and certain supervisors.

This petition for enforcement and cross-petition to vacate followed the Board's decision and order.

II. Discussion

The company argues on appeal that the Board's findings of unfair labor practices are not supported by substantial evidence, that the Board abused its discretion in fashioning harsh and overbroad remedies, and that the ALJ's

consolidation of the two complaints against the company was highly prejudicial to the company and requires a new trial of each complaint. The Board maintains that the findings and the remedy were within its broad discretion to identify and remedy violations of the Act, and the consolidation was not prejudicial.

A. The Board's Unfair Labor Practice Findings

The Board and Nichols give radically different explanations for the company's actions between August 1979 and June 1980. According to the company, dismissals were not based on union activities but on employee inadequacy. Speeches by company officials were designed not to coerce workers but simply

to express the company's point of view. Yet, in cases where difficult issues regarding employer motivation are of primary concern, the Act vests primary responsibility in the Board to resolve these critical issues of fact. NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983). Moreover, it is by now hornbook law that the Board's findings of fact can be overturned on review only if those findings are not supported by substantial evidence on the record considered as a whole.

In addition, credibility findings made by the ALJ and accepted by the Board will not be set aside unless they are "hopelessly incredible" or they "flatly contradict" either the "law of nature" or

"undisputed documentary testimony." Id. at 60. It is true that the testimony regarding the unfair labor practices charged in the second complaint was not actually heard by the ALJ because the parties stipulated that the record from the section 10(j) proceeding in the district court be accepted in lieu of testimony. The company argues, in effect, that this lack of live testimony at the September 1980 hearing on the consolidated cases calls into question the ALJ's credibility determinations with respect to the second complaint. For this reason, the company urges us to rely more heavily on the district court's finding in the section 10(j) proceeding that there was not reasonable cause to believe that the unfair labor practices

charged in the second complaint had occurred. We do not find this reasoning persuasive. The Board found that all of the ALJ's credibility determinations regarding the second complaint were based on factors other than demeanor, and it then accepted those determinations. Under the circumstances, we are required to give great deference to the Board's determinations of credibility. Moreover, the law is clear that findings made on a motion for a temporary injunction under section 10(j) are not determinative of the merits in a subsequent unfair labor practice proceeding, and that review of the latter is limited by the substantial evidence rule. NLRB v. Acker Indus., Inc., 460 F.2d 649, 652 (10th Cir. 1972); cf. NLRB v. Knitgoods Workers Union Local

155, 403 F.2d 388, 391 (2d Cir. 1968). In addition, as indicated above, our affirmance of the district judge's denial of a 10(j) injunction made clear that resolution of that application would not affect the then pending Board proceeding. Keeping in mind the above considerations, we turn to the issues before us.

1. The Discharges

The company strenuously maintains that it discharged Reinhardt, Vincent, Styles and Burkle in September 1979 because they were performing their jobs unsatisfactorily. The Board found that the company's motives were less benign and that the discharges were in retaliation for union organizing activities and, thus, violated § 8(a)(3) and (1) of the Act. These sections

provide in pertinent part that it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment" and "to interfere with, restrain, or coerce employees in the exercise of [their right to join or form labor unions]." 29 U.S.C. § 158(a)(3) and (1).

Firing an employee for engaging in union activities violates both § 8(a)(1) and (3) of the Act. NLRB v. J. Coty Messenger Serv., Inc., 763 F.2d 92, 98 (2d Cir. 1985). The key issue in discriminatory discharge cases is the employer's motivation. Abbey's Transp. Services, Inc. v. NLRB, 837 F.2d 575, 579 (2d Cir. 1988). The Supreme Court has approved a two-part test for determining unlawful motivation. Id. (citing NLRB v.

Transp. Management Corp., 462 U.S. 393, 402-03 (1983)). Initially, the General Counsel must establish a prima facie case that protected conduct was a motivating factor in the employer's decision to fire. The burden then shifts to the employer to show, as an affirmative defense, that the discharge would have occurred "in any event and for valid reasons." Transp. Management, 462 U.S. at 400. If the employer's asserted reasons for the discharge are shown to be a pretext to mask discrimination, the burden has not been met. Abbey's Transp., 837 F.2d at 579.

The Board found a prima facie case of discriminatory discharge based both on the company's long history of antiunion animus and the company's knowledge of the

employees' union activities. In addition to these basic findings, the Board made numerous other findings indicating unlawful motive. Nichols dismissed all four employees three or four days after they initiated and participated in the union organizing campaign at the store, and it never gave them preliminary warnings or discipline short of discharge for improper performance of their tasks. The employees were discharged with previously prepared pay-checks, and they were given no chance to defend themselves. The abruptness of a discharge and its timing are persuasive evidence that a company has moved swiftly to eradicate the prime movers of a union drive, see Abbey's Transp., 837 F.2d at 580 (citing NLRB v. Montgomery Ward &

Co., 242 F.2d 497, 502 (2d Cir.), cert. denied, 355 U.S. 829 (1957)). All of these facts provide a convincing case of discriminatory discharge.

The company's claim that it dismissed the workers for cause was rejected by the Board. Reinhardt had been commended on her work by district supervisor Korcz less than three weeks before her dismissal. Her immediate supervisor testified that she was a "very good employee." Vincent had never been reprimanded and was regarded highly enough to have been granted a requested transfer. Moreover, the absence of discipline or warnings prior to discharge suggests that the alleged dissatisfaction with performance was an afterthought. The testimony by management was often

contradictory, and the company failed to bring forth any convincing evidence that the employees deserved to be discharged. There is no doubt that the company's proffered reasons for the dismissals could validly be interpreted as pretextual. Clearly, there was substantial evidence in the record to conclude that the employees were fired on account of their union activities in violation of § 8(a)(1) and (3) of the Act.

2. Anti-Union Campaign

Based in large part on credibility determinations and inferences from the coercive atmosphere existing at the store, the Board found that the Company had committed, among others, the following violations of the Act:

threatening further discriminatory discharges after the September 1979 dismissals in order to discourage union participation; soliciting employees to withdraw their union authorization cards; threatening that the company could discover who had signed union authorization cards; and threatening to discharge the four previously dismissed employees if they were reinstated. The company disputes these findings maintaining that its employee meetings following the discharges of four prominent union activists in September 1979 were designed to communicate legally and fairly the ramifications of labor representation, and that its policies did not discriminate between labor unions and other organizations. However, the ALJ heard

the issues and resolved the conflicts of credibility. United Aircraft Corp. v. NLRB, 440 F.2d 85, 91 (2d Cir. 1971). We do not find the credibility findings by the ALJ and approved by the Board either incredible or flatly contradicted by undisputed documentary testimony. American Geri-Care, 697 F.2d at 60. Based on these reasonable credibility determinations and allowable inferences from the activities at the store, we find substantial evidence to support the Board's findings.

The company also objects to numerous other findings that it committed violations during the campaign. However, once again the company simply disagrees with the Board's findings and asks us to accept its characterization of the

evidence as though our function were to determine facts rather than to decide whether the Board's findings are supported by substantial evidence on the record considered as a whole.

Thus, the company disputes a determination that it violated § 8(a)(1) by soliciting employee complaints and promising to rectify them. Nichols argues that it was not soliciting complaints and promising remedies in order to dissuade employees from joining unions but was simply acting in accordance with its "open door" policy. However, the Board found that before the union campaign, no meetings had ever been held in which employees were encouraged to state their complaints. We believe that the Board had substantial evidence

to find that no prior open door policy existed and that such a belated change in policy towards grievances and corrective action constituted a violation of the Act. NLRB v. Chester Valley, Inc., 652 F.2d 263, 270 (2d Cir. 1981).

Similarly, the company objects to the finding that it enforced a no-solicitation rule in discriminatory fashion in violation of § 8(a)(1) of the Act. The company handbook dictates that no employee should distribute literature during working time on company property, and the company denies enforcing this provision in a discriminatory way. Yet, there was no evidence that any employee had ever been reprimanded for, or told to cease, soliciting or distributing for nonunion purposes even though there was

voluminous testimony that employees constantly solicited for other kinds of organizations. Clearly, the Board's finding of an unfair labor practice in this respect was supported by substantial evidence. NLRB v. J.P. Stevens & Co., 464 F.2d 1326, 1336 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973).

Nichols also disputes the determination that during the campaign it offered wage increases to discourage employee support for a union. The company claims that it was simply carrying out an established policy regarding employee raises. The Board found that this policy, if it existed, was not uniformly applied and was not the motivation behind the statement. There was substantial evidence to support the

finding that the offer of benefits was intended to discourage employee support for a union and therefore violated the Act. J. Coty Messenger Serv., 763 F.2d at 96.

Finally, the company objects to a finding that it violated the Act by telling employees that they could receive the advice of the company's attorney in connection with interviews by Board investigators. Nichols claims that it was simply advising its workers of their right to counsel. The ALJ discounted this explanation because the advice seems to imply the need for protection and would have the effect of dissuading employees from cooperating with the Board's investigation since the "most fearless employee would find it difficult

to provide the Board with information against his employer when he was accompanied and being 'advised' by the employer's counsel." The Board agreed, and so do we. In the context of a virulent anti-union campaign, the Board had substantial evidence to find a violation of the Act. Although the company does not rely upon it in this context, we note a decision of the Fifth Circuit, which held that a letter informing employees of their right to counsel did not violate the Act. Florida Steel Corp. v. NLRB, 587 F.2d 735, 751 (5th Cir. 1979). In that case, however, an employer sent a letter to employees after an election had taken place, simply informing the employees that counsel was available. Id. In this case, Korcz, in

the midst of an anti-union campaign in which four union activists had been fired, told the employees that "if they needed any protection he would get his lawyer to sit in on the meeting." The statement was made face-to-face to employees, the "advice" was given during a union campaign, and the employer offered only his own counsel.

Although we have not specifically discussed each and every violation found by the Board, the company is simply offering us in each instance an explanation for its actions that was rejected by the Board. After thorough examination of all of the claims, we uphold all of the Board's findings of violations committed during the company's campaign against unionization.

3. Harassment of Workers after Testimony in Board Proceedings

The Board found that Nichols violated § 8(a)(1), (3) and (4) by giving Klimacek and Pumilio written warnings, withholding Goldsmith's wage increase and subjecting the three employees to ridicule, increased supervision and unfavorable working conditions. The company maintains that its actions with respect to these employees were legitimate, and that it neither retaliated, nor discriminated, against them on account of their willing participation in a Board proceeding.

The Board found that the company began discriminating against the three employees just after their testimony in the March proceeding by enforcing previously unenforced rules, subjecting

them to increased supervision and humiliating them in front of their fellow workers. Based on the employee's testimony, the Board found that supervisors gave a written warning to Klimacek without any investigation into alleged complaints about her behavior; gave a warning to Pumilio for actions which were accepted from others; and denied Goldsmith a pay raise and told her to "ask the Union to give her a raise."

We see no persuasive reason to disregard the testimony of the three employees found credible by the ALJ and the Board. The Board also properly considered the timing of management's decision to issue the disputed warnings. An inference of anti-union animus is proper when the timing of the employer's

actions is "stunningly obvious." American Geri-Care, 697 F.2d at 60 (citing NLRB v. Long Island Airport Limousine Serv. Corp., 468 F.2d 292, 295 (2d Cir. 1972)). The Board also justifiably found that the sudden use of previously ignored rules supports a finding that the real reason for disciplining union adherents is their protected activity. J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 296 (2d Cir. 1967), cert. denied, 389 U.S. 1005 (1968). The evidence adequately supports the findings that the Company violated § 8(a)(1), (3) and (4) in its treatment of these three employees.

After a thorough examination of all of the Board's findings of unfair

labor practices, we uphold the findings in their entirety.

B. The Board's Remedial Power

Section 10(c) of the Act directs the Board, if it concludes that a party before it has engaged in an unfair labor practice, to order the party "to cease and desist from such unfair labor practice, and to take such affirmative action ... as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). The Supreme Court has consistently stressed that the Board's remedial power "is a broad discretionary one, subject to limited judicial review." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964). The Board's order should "not be disturbed 'unless it can be shown that the order is a patent

attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" Id. (quoting Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943)).

The Board's order in this case contains the usual cease and desist, reinstatement and back pay provisions about which there can be no valid question in light of our holding as to the substantiality of the evidence. The company's remaining objections are to various affirmative steps required of the company in order to eliminate the coercive atmosphere created by its improper activities. See United Steelworkers of Am. v. NLRB, 646 F.2d 616, 635 (D.C. Cir. 1981) (citing Textile

Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965)).

Those remedial steps can be loosely grouped into access remedies and notice remedies. As to the former, the Board ordered the company (1) to give a union, upon request, reasonable access to company bulletin boards for a one-year period in the stores in Korcz's district; (2) to grant a union equal time if a store in the district convened its employees for a speech on union representation and rebuttal time if requested; and (3) to allow a participating union to make one 30-minute pre-election speech if there is a Board election involving the union in the district. As to the notice remedies, the Board ordered the company to post a

notice in all stores in the district, to mail the notice to all employees in the district, and to have president Brecker read the notice to all employees in the district and to certain supervisors. Before considering the company's specific objections to each group of remedies, we turn to its principal objection, which applies to both.

The ALJ recommended that the various remedial sanctions be applied to all 43 of the company's stores in many states. The Board cut back the effect of the recommended order by limiting it to the eight stores in the district supervised by Korcz -- five in upstate New York and three in Ohio. The company argues to us that the order so limited is still too broad, and that, if enforced at

all, it should apply only to the Herkimer store where the unfair labor practices occurred.

In certain cases, the Board has discretion to expand its remedial powers beyond the actual locations at which unfair labor practices were committed in order to offset effects caused by extensive unlawful conduct. NLRB v. Jack La Lanne Management Corp., 539 F.2d 292, 295 (2d Cir. 1976) (unfair labor practices at one location remedied at 10); United Aircraft Corp. v. NLRB, 440 F.2d at 100; J.P. Stevens, 380 F.2d at 304. In the past, this court has considered a number of factors relevant in determining whether the Board, in its discretion, could expand its customary remedial order: whether the employer has

repeatedly shown anti-union animus on a broad scale, Jack La Lanne, 539 F.2d at 295; United Aircraft, 440 F.2d at 100; whether a company's labor policies are determined at a central location rather than at each individual workplace.

In this case, Nichols has a long history of illegal anti-union activity. We take judicial notice, as did the Board, of the many cases finding the company or its affiliates in violation of the Act for efforts to interfere with the statutory right of its employees to establish a union. See supra note 1. In the case now before us, the Board found that the company's long history of violations justified imposition of extraordinary access and notice remedies. Earlier, in S.E. Nichols of Ohio, Inc.,

258 NLRB 1, 1 n.3 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 464 U.S. 914 (1983), the Board had noted the company's clear "disregard for the rights of its employees and its contempt for" the Act, the Board and the Sixth Circuit. At that time, the Board also stated that the company's history of committing unfair labor practices "clearly demonstrates" that over a 15-year period the company had "uniformly committed unlawful acts in response to attempts to organize [its] stores." This history almost certainly indicates a general knowledge by the company's employees that it is willing and likely to engage in coercive activity in response to union campaigns in its stores. See J.P. Stevens, 380 F.2d at 304.

The eight district stores affected by the order are all in New York and Ohio, and three stores -- those in Herkimer, Marcy and New Hartford -- are within 13 miles of one another. The record also reveals that employees have moved between the stores. Edward Lintz, an anti-union employee at Herkimer, had previously worked at the Nichols store in Marcy. Robert Hathorn, the Herkimer store manager, had been an assistant manager at a Nichols store in New Philadelphia, Ohio, and Korcz had previously been manager of the Marcy store. Korcz also testified that labor policy is not determined at each individual store but by president Brecker in New York City.

One other factor is very important in considering the Board's discretion to apply its remedies throughout the district. The people responsible for managing the stores at the district-wide level were the individuals most culpable for the findings of violations at Herkimer. District supervisor Korcz, who visited each store in the district at least once a month, participated directly, personally and repeatedly in the unfair labor practices at the Herkimer store. The Board found that Korcz told the employees that the company would engage in the same conduct against the union at Herkimer as it did at its store in Marcy, even though Korcz knew the conduct was unlawful. See S.E. Nichols Marcy Corp., 229 NLRB 75,

enforced by consent judgment, No. 77-4154 (2d Cir. 1977). President Brecker repeatedly and unrelentingly attacked the Board's neutrality and openly disparaged those employees who had testified on behalf of the Board. He also used coercive tactics such as stating, in effect, that reinstated union adherents do not last very long in the company's employ. The record also shows that Brecker had previously participated in unfair labor practices at two stores located in Korcz's district.

In short, we believe that there is substantial evidence in the record as a whole of a conscious corporate-wide policy to coerce company employees in the exercise of their right to join or form labor unions, at least in the area

subject to the jurisdiction of district supervisor Korcz. On this record, therefore, the Board had discretion to select remedies coextensive with that company policy, which was a violation of the Act, and to impose district-wide access and notice requirements in the eight stores in Korcz's district in order to remedy the chilling effect of the company-produced coercive atmosphere.

Turning now to other aspects of the remedial relief, the company objects to all of the access remedies on the same grounds: there are no findings that the company restricted union access, and the Board unlawfully invaded the company's property rights by forcing them to open their doors to unwanted individuals. We

find neither of these arguments persuasive.

There is no doubt that an extensive campaign of unfair labor practices can produce effects on employees that cannot be offset simply by reinstating discharged employees or by other conventional remedies. See United Steelworkers, 646 F.2d at 634-35. To offset the effects of such unfair labor practices, courts and the Board have recognized that at times more extensive remedies are needed. In order to accomplish that result, it has been found necessary in some cases to grant a union access to company bulletin boards or to the plant itself. Id. See also NLRB v. J.P. Stevens & Co., 563 F.2d 8, 24-25 (2d Cir. 1977), cert. denied, 434 U.S. 1064

(1978) (access remedies needed to "dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign.") We believe that the Board had discretion to impose these more extensive remedies in order to assure employees that the company will not interfere with their statutory right to join a union. United Steelworkers, 646 F.2d at 635. The access remedies certainly do not constitute "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act." Fibreboard Products, 379 U.S. at 216. In addition, we find disingenuous the company's argument that there is no finding that it restricted union access. It did interfere directly with such access by

firing the union activists at the Herkimer store, who were in fact acting as conduits of union information. See Teamsters Local 115 v. NLRB, 640 F.2d 392, 400 (D.C. Cir.), cert. denied, 454 U.S. 827 (1981).

The company cites NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) for the proposition that the company's property rights preclude union access to its property unless there are no other reasonable means of reaching the employees. But Babcock & Wilcox is inapposite because it does not deal with the remedial powers of the Board; it only seeks to determine when an employer's denial of access to his property can itself be deemed an unfair labor

practice. Teamsters Local 115, 640 F.2d at 400.

As to the notice remedies, in addition to the scope of the posting and mailing requirement discussed above, the company objects to the punitive nature of the reading requirement. That requirement was designed "to undo the effect" of numerous and egregious unfair labor practices by assuring employees that the company will respect the rights of workers to form and join unions. See J.P. Stevens, 380 F.2d at 305. It insures that the full counteracting force of the remedial order will be felt by the employees. Id. On the other hand, we have held that there is an element of some humiliation in the requirement that a company official personally and

publicly read the notice. Id. at 304. Therefore, we will enforce this aspect of the order only at the Herkimer store, where the violations took place, and require the Board to afford the company the alternative, at its option, of having the notice read by a Board representative, rather than by president Brecker. This alternative eliminates the necessity of participation by the company, if it so desires, and still guarantees effective communication of the Board's order to the company's employees. Textile Workers of America v. NLRB, 388 F.2d 896, 904-05 (2d Cir. 1967), cert. denied, 393 U.S. 836 (1968); J.P. Stevens, 380 F.2d at 305.

The Board has called to our attention a recent decision of the Court of Appeals for the District of Columbia

enforcing, without such an option, the reading requirement the Board seeks here, United Food and Commercial Workers v. NLRB, Nos. 87-1457 and 87-1574, slip op. at 8-10 (D.C. Cir. August 2, 1988). However, we have not held that such a remedy "would never be appropriate." Indeed, we have implied just the opposite. Textile Workers, 388 F.2d at 904, n.9; J.P. Stevens, 380 F.2d at 305 n.21. We simply hold that it is not called for by the circumstances here.

C. Consolidation of the Complaints by the ALJ

The company argues that consolidation of the two unfair labor practice complaints by the ALJ in July 1980 after she had heard testimony on the first complaint was prejudicial to the company

and requires separate retrials of the complaints. The Board found that the consolidation was proper because the two cases involve the same parties and factually related events, and both parties had a full and fair opportunity to litigate the issues. Furthermore, the Board found no evidence that the ALJ prejudged the cases or demonstrated bias against the company. We believe that this was a matter within the Board's discretion, and see no reason to overrule the Board's determination.

One last word. The Board issued its order six-and-a-half years after the ALJ's decision. While some of the delay was undoubtedly due to the company's massive attack on the ALJ's decision (the exceptions to it cover 140 typewritten

pages), we are troubled by this delay. Nevertheless, we do not think it provides a justification in this case for refusing to enforce an order designed to insure the company's employees the right to participate freely in union activities. See 29 U.S.C. § 158(a)(1). At oral argument, the company relied on our recent decision in NLRB v. Koenig Iron Works, Inc., Nos. 87-4134 and 87-4136 (2d Cir. Aug. 26, 1988), to support its contention that the passage of time was sufficient reason to refuse to enforce the Board's order. However, that case, and others cited by the company, dealt with the propriety of a bargaining order. Such decisions are not controlling here where the Board seeks to remedy the effect of the company's past unfair labor

practices by restoring, as much as possible, the status quo that existed at the time the practices occurred. Moreover, since there is no bargaining order here, there need be no concern that employees will be deprived of their free choice by subjecting them to representation they may no longer favor.

The Board's petition for enforcement is granted, with the modification of the order set forth above, and the cross-petition to vacate is denied.

* Honorable Leonard I. Garth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1/ See, e.g., S.E. Nichols Marcy Corp., 229 NLRB 75 (1977), enforced by consent judgment, No. 77--4154 (2d Cir. 1977) (actions during aggressive anti-union campaign in Marcy, New York store violated Act); S.E. Nichols Shillington Corp., 195 NLRB 189 (1972), enforced, 475 F.2d 1395 (3d Cir.), cert. denied, 414 U.S. 860 (1973) (discharge of union activist in Shillington, Pennsylvania store violated Act); S.E. Nichols of Ohio, Inc., 195 NLRB 939 (1972), enforced, 472 F.2d 1228 (6th Cir. 1972) (discharge of emerging union leaders in New Philadelphia, Ohio store violated Act).

2/ Local 345 was merged with Local 1 in November 1979, and Local 1 was the petitioning labor organization before the Board.

3/ Hereafter, we will refer to the findings as the Board's, unless there is a reason to distinguish between the Board and the ALJ.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 88-4057, 88-4087

Board Case Nos. 3-CA-9304
3-CA-9714

----------x

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S.E. NICHOLS, INC.,

Respondent.

----------x

JUDGMENT

Before: FEINBERG, Chief Judge, NEWMAN and GARTH,* Circuit Judges.

---

* Honorable Leonard I. Garth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, S.E. Nichols, Inc., Herkimer, New York, its officers, agents, successors, and assigns on June 30, 1987. The Court heard argument of respective counsel on October 4, 1988, and has considered the briefs and transcript of record filed in this cause. On November 29, 1988, the Court, being fully advised of the premises, handed down its decision granting enforcement of the Board's Order, as modified. In conformity therewith it is hereby

ORDERED AND ADJUDGED by this Court that the Respondent, S.E. Nichols, Inc., Herkimer, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of employment, loss of benefits, or increased work duties if they choose to be represented by a labor organization.

(b) Soliciting employee complaints and grievances and promising to remedy them.

(c) Promising employees any wage increase, bonus, or other benefits to discourage membership in or support of any labor organization.

(d) Soliciting employees to withdraw or retract their authorizations for union representation.

(e) Coercively directing or advising employees not to sign union authorization cards or any papers other than pay receipts.

(f) Telling employees that the Respondent or its counsel would learn the identity of employees who signed union cards.

(g) Telling employees that discriminatorily discharged employees had not been and would not be reinstated or that any such employees who are reinstated will not remain in the Respondent's employ.

(h) Promulgating, maintaining, or enforcing any rule prohibiting employees from soliciting or distributing written materials on behalf of any labor organization during working time without

affirmatively and clearly specifying the times during which employees may lawfully engage in such activities.

(i) Imposing or enforcing any restriction or limitation on solicitation and distribution by any employee on behalf of any labor organization greater than restrictions on solicitation or distribution by employees for any other purpose.

(j) Telling employees that an employee was discharged for engaging in protected concerted activities.

(k) Keeping in effect or distributing its employee handbook (or any past or future version thereof) so long as it contains its present rules concerning solicitation and distribution or the advice that employees sign no

papers other than pay receipts found in the section entitled "Employee Rights & Unions---Your Employee Rights and Legal Rights under a Union Organization Drive."

(l) Expressing approval of, and threatening to engage in, conduct similar to that which has previously been found to violate the National Labor Relations Act (hereinafter called the Act).

(m) Withholding wage increase from any employees because they have testified on behalf of the General Counsel in a Board proceeding or because they support a labor organization.

(n) Discharging, embarrassing and ridiculing, disciplining, or subjecting to increased supervision or otherwise discriminating against any employees because they have testified in any Board

proceeding, have been named in any unfair labor practice charges or complaints, or because they support or have supported any labor organization or have engaged in protected concerted activities.

(o) Soliciting employees to inform the Respondent of the union or other protected activities of other employees.

(p) Offering the assistance of the Respondent's counsel to employees in connection with Board investigations or proceedings.

(q) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act.

(a) Offer Dorothy C. Reinhardt, Douglas Vincent, Kristin Burkle, and Denise Styles immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

(b) Grant Margaret Goldsmith a wage increase of not less than 15 cents per hour.

(c) Make all the employees whole for any loss of pay they have suffered by reason of the Respondent's discrimination against them in the manner set forth in the remedy section of the judge's decision and the Board's Decision and Order.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Remove from its records and destroy all references to the written warnings given to employee Fred Pumilio on 26 March 1980 and to employee June E.

Klimacek on 7 April 1980 and to the discharges of Dorothy Reinhardt, Douglas Vincent, Kristin Burkle, and Denise Styles. Notify each of the discriminatees in writing that this has been done and that their respective disciplines will not be used against them in any way.

(f) Remove from its employees' handbook the rules concerning employees solicitation and distribution of literature.

(g) Post in conspicuous places at its store in Herkimer, New York, the corporate district supervised by Henry Korcz, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 3 of the National Labor Relations Board (Buffalo, New

York), after being duly signed on behalf of the Respondent by President Manfred Brecker, by Henry Korcz, and by the highest managerial official of the store in which the notice is posted, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Reproduce and mail to the home of each of its employees at all its stores in Korcz' district a facsimile of the signed notice, together with a letter appended hereto as "Appendix B." The

letter shall be reproduced on the Company's regular business stationery and signed by President Brecker and by the highest official of the recipient's store. The Respondent shall provide the aforesaid Regional Director with proof of such mailing.

(i) Reproduce and give to each supervisor at its Herkimer, Marcy, and New Hartford, New York stores a facsimile of the notice, and give written instructions, signed by the highest official at each store, to each supervisor to comply with the provisions of the notice. The Respondent shall provide the said Regional Director with proof of compliance with this paragraph.

(j) At such reasonable time after the entry of this Judgment as the Board may request, convene during working time all its employees and also the supervisors at the Herkimer store, and have the notice read by President Manfred Brecker, or, at the Company's option, a Board representative. The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at all such meetings.

(k) On request of a union, made within 2 years from the date hereof, immediately grant such union and its representatives reasonable access to the store bulletin boards and all places where notices to employees are customar-

ily posted, at each of the Respondent's stores in Korcz' district for a period of 1 year from the date of request.

(l) In the event that during a period of 2 years following entry of this Judgment any supervisor or agent of the Respondent convenes any group of employees at any of the Respondent's stores in Korcz' district and addresses them on the question of union representation, give notice to any union attempting to organize the employees and afford two union representatives a reasonable opportunity to be present at such speech and, on request of the representatives, permit one of them to address the employees for the same amount of time as the Respondent's address.

(m) If within the next 2 years the Board schedules an election at any of the Respondent's stores in Korcz' district then, on request by any participating union, afford at least two representatives of such union reasonable access to each of the Respondent's stores and appropriate facilities to deliver a 30-minute speech to employees on working time, the date to be within 10 working days before but not within 48 hours prior to any such election.

(n) On request of a union immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees at any store in Korcz' district where the Union is conducting an organizing campaign, as of the latest available payroll date, and

furnish a corrected, current list to such union at the end of each 6 months thereafter during the 2-year period referred to above.1/

(o) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply.

1/ If either Brecker or Korcz no longer occupies the position he held during the commission of the unfair labor practices found herein, then the specific obligations set forth in paragraph 2 of this Judgment shall be carried out by the individual currently holding that position.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

_____
Judge, United States Court of Appeals for the Second Circuit

_____
Judge, United States Court of Appeals for the Second Circuit

FILED:

_____

APPENDIX A

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF

THE UNITED STATES COURT OF

APPEALS ENFORCING AN ORDER,

AS MODIFIED, OF THE NATIONAL

LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of employment, reduction in benefits, or increased work assignments if you choose to be represented by a union.

WE WILL NOT solicit your grievances or complaints and promise to adjust them in order to interfere with your union activities.

WE WILL NOT promise any wage increase, bonus, or other benefits in order to discourage you from seeking union representation.

WE WILL NOT solicit you to withdraw or retract authorizations for union representation which you have executed.

WE WILL NOT direct you or coercively advise you not to sign union authorization cards or any papers other than pay receipts.

WE WILL NOT tell you that we will learn the identity of any of you who sign a union authorization card.

WE WILL NOT tell you that discriminatorily discharged employees will not be reinstated or that any such employees who are reinstated will not remain in our employ.

WE WILL NOT tell you that an employee was discharged for engaging in protected concerted activities.

WE WILL NOT restrict your right to solicit or to distribute written or printed material on behalf of any labor organization without clearly telling you when you may lawfully engage in such activities.

WE WILL NOT impose any greater restriction on the solicitation or distribution or receipt of written or printed material on behalf of a union than is imposed on all other forms of solicitation or distribution and receipt of material.

WE WILL NOT withhold wage increases from any of you because you have testified in a Board proceeding or because you support a labor organization.

WE WILL NOT indicate to you that we approve of or will repeat any type of conduct by which the Board has determined that we have previously violated the National Labor Relations Act.

WE WILL NOT ask or solicit any of you to report to or inform us of the union or other protected concerted activity of other employees.

WE WILL NOT offer to you the assistance of our attorney in connection with Board investigations or proceedings.

WE WILL NOT discriminate against you because you have engaged in union or protected concerted activities or because you have testified in National Labor Relations Board hearings or have been named in any charge or complaint before the Board, or to discourage membership in

or support of any labor organization. Specifically, WE WILL NOT discriminate against any of you by discharging you; reprimanding, warning, or disciplining you, withholding wage increases from you, subjecting you to increased supervision; subjecting you to ridicule or embarrassment; or in any other manner.

WE WILL offer Dorothy C. Reinhardt, Douglas Vincent, Denise Styles, and Kristin Burkle immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL pay each of these four employees for any earnings and other benefits they lost as

a result of our discrimination against them less any net interim earnings, plus interest.

WE WILL give Margaret Goldsmith a wage increase and pay her, with interest, for any loss she suffered as a result of our having previously withheld a wage increase from her.

WE WILL notify Fred Pumilio and June Klimacek that we have removed from our files any references to the written warnings given them on 26 March and 7 April 1980, respectively. WE WILL notify Dorothy Reinhardt, Douglas Vincent, Denise Styles, and Kristin Burkle that we have removed from our files any references to their discharges. WE WILL

also notify all these employees that their discipline will not be used against them in any way.

WE WILL rescind and withdraw from our employees' handbook the rules concerning employees' solicitation and distribution of literature.

WE WILL withdraw our employee handbook from distribution and circulation until such time as the positions referred to above have been physically deleted.

WE WILL, for 2 years, give all our supervisors at our Herkimer, Marcy, and New Hartford, New York stores copies of this notice and instruct them to comply with its provisions.

WE WILL grant to any union access to our bulletin boards, list of the names and addresses of our employees and, as ordered, speaking opportunities at any store within this district of the Company at which the requesting union is attempting to organize our employees.

WE WILL send to all our employees within this district of the Company copies of this notice, with an explanatory letter; and WE, or at our option, a Board representative, WILL read this notice to all our employees at the Herkimer store.

S.E. NICHOLS, INC.

_____
(Employer)

Dated _____ By_____
(Representative) (Title)

Dated _____ By_____
(Manfred Brecker) (Pres.)

Dated _____ By_____
(Henry Korcz) (Divi. Mgr.)

Dated _____ By_____
(Store Manager)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 901, 111 West Huron Street, Buffalo, New York 14202, Telephone 716-846-4951.

APPENDIX B

Dear Nichols Employees:

Pursuant to an order of the National Labor Relations Board, this letter and enclosed notice are being sent to assure you that your rights as employees under the National Labor Relations Act will be honored and protected.

The National Labor Relations Board has found that, since 1965, we have violated the rights of our employees in the course of union organizing campaigns in our stores in Dover, Delaware; Shillington, Pennsylvania; New Philadelphia, Ohio; and Elmira and Marcy (Utica), New York. When these decisions by the National Labor Relations Board have been appealed, the United States circuit

courts of appeals have affirmed them. We have also been held in contempt of court for violating such orders at our New Philadelphia, Ohio, and Shillington, Pennsylvania stores. In addition to the cases referred to above, on our settlement agreements, orders have been issued against us for our conduct in connection with a union campaign at our store in Matawan, New Jersey. Most recently it has been held that we violated the National Labor Relations Act in a union organizational campaign at our store in Herkimer, New York.

The Board has held that, in large part, our campaigns have followed much the same general pattern in all union organizational campaigns. That pattern, as reflected in the enclosed notice,

includes, among other things, discharge of employees who attempt to unionize; discrimination in various ways against employees who support a union or who cooperate with the National Labor Relations Board in investigating and prosecuting cases against us; threats of detriment to employees who choose to be represented by a union; promises of benefits to discourage employees from choosing union representation; restriction of employees' legal rights to solicit for and distribute literature on behalf of unions.

In the situation that occurred at Herkimer, it has been found that we have interfered with investigations by the National Labor Relations Board and that we have improperly led our employees to

believe that the Board is interested in supporting unions but is unable and unwilling to protect the rights of employees under the Act. We disavow any such statements and implications. The Board is open to all persons who believe that any violation of the National Labor Relations Act has been committed and the Board is required to protect the rights of all persons under the Act.

We may, of course, exercise our right to free speech concerning union matters. However, we assure you that we will make every possible and sincere attempt to keep our conduct within proper bounds. We want you to know that you are entirely free to consult the National Labor Relations Board if at any time you believe we may have violated your rights

under the National Labor Relations Act. We will not unlawfully inquire about or otherwise interfere with any contacts, direct or indirect, you may have with the Board.

Very truly yours,

Manfred Brecker, President

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 88-4057, 88-4087

Board Case Nos. 3-CA-9304
3-CA-9714

----------x

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S.E. NICHOLS, INC.,

Respondent.

----------x

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's proposed judgment in the above-captioned case has this day been served by first class mail upon the following counsel at the address listed below:

Leonard W. Wagman, Esq.
Golenbock and Barell
645 Fifth Avenue
New York, NY 10022

Aileen A. Armstrong
Deputy Associate General
Counsel
NATIONAL LABOR RELATIONS
BOARD

Dated at Washington, D.C.

this 8th day of December, 1988.

284 NLRB No. 55

DJS
D--4516
Herkimer, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

S. E. NICHOLS, INC. Cases 3--CA--9304
3--CA--9714

and

LOCAL NO. 1, UNITED
FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION, AFL--CIO

DECISION AND ORDER

On 31 December 1980 Administrative Law Judge Josephine H. Klein issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2]

---

[1] The Respondent has excepted to the judge's consolidation of Case 3--CA--9304, in which the hearing had closed, with Case 3--CA-9714, in which the complaint had just issued. It contends (1) that the judge "may have already reached certain determinations and conclusions" in Case 3--CA-9304 and thus her decision on issues in that case would prejudice her determinations and (2) that the issuance of the complaint in Case 3--CA--9714 may affect considerations already made in Case 3--CA--9304 and therefore may have made it impossible for her to render a fair decision in the earlier case. The record shows, however, that the two cases involve the same parties and factually related events and that both parties had a full and fair opportunity to examine all the witnesses and to litigate all the issues. Furthermore, on our

(footnote continued)

and conclusions[3] only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent's pre-1980 no-solicitation and no-distribution rule violated Section

---

consideration of the entire record in these proceedings we find no evidence that the judge prejudged the cases, made prejudicial rulings, or demonstrated bias against the Respondent in her analysis and discussion of the evidence. We therefore find no merit to the claim that the Respondent was denied due process by the consolidation or to its argument that the judge exhibited bias.

2 The Respondent has expected to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At the hearing in Case 3--CA--9714
(footnote continued)

8(a)(1). Although she relied on then-current Board law which held that rules prohibiting employee solicitation and distribution during "working time" are presumptively valid,[4] the judge found

---

the parties stipulated that the record from the 10(j) injunction portion of this proceeding be accepted in lieu of testimony before the judge. In her decision the judge noted that the court made no credibility findings, stated that her appraisal of credibility was based on considerations other than demeanor, and in all but the following three instances stated the basis for crediting testimony: employee Pumilio's testimony that Store Manager Hathorn asked him why "the Federal Labor Board wanted [Pumilio] to testify"; Pumilio's testimony that District Superior Korcz told him to remain henceforth in his department; and employee Klimacek's testimony that, contrary to past practice, she had to load cases of oil onto a pallet unassisted. The Respondent contends that all the judge's credibility resolutions were based on demeanor. Concerning the above three instances we find nothing in the judge's decision to indicate, and the

(footnote continued)

that the Respondent's use of the phrase "the working time" (emphasis added) rendered the rule fatally ambiguous. The judge reasoned that the Respondent's rule would be understood by employees as being

---

Respondent has not shown otherwise, that her crediting Pumilio and Klimacek in these instances was based on demeanor rather than other considerations. Moreover, the judge generally credited Pumilio and Klimacek, rather than the supervisor, because they testified against the Respondent while in its employ. Such testimony is against their own interests and therefore is more reliable than the supervisor's testimony. Rodeway Inn of Las Vegas, 252 NLRB 344 (1980). Further, bias and partiality are not established merely because the judge resolved factual conflicts in favor of the General Counsel's witnesses. NLRB v. Pittsburgh Steamship Co., 337 U.S. 656 (1949).

We correct four inadvertent errors of the judge. First, in fn. 24 of her decision, the judge incorrectly stated that the Respondent's president, Brecker, testified at the district court trial that all employee meetings

(footnote continued)

broader in scope than a lawful reference to times when employees would be actually at work. In effect, the judge equated this rule using the phrase "the working time" with a presumptively invalid rule

---

were taped when, in fact, it was District Supervisor Korcz who so testified in the hearing in Case 3--CA--9304. Second, the judge identified two of the Respondent's witnesses in the district court hearing in Case 3--CA--9714 as Rose Stagliano and Edward Lintz. The record discloses that the two witnesses were Beverly Stagliano and Rose Ceneviva. Third, the judge found that Brecker spoke at the 18 April employee meeting when, in fact, it was Korcz. Finally, the judge stated that the Respondent operates 42 stores in 3 States. The record establishes that the Respondent operates 43 stores in 10 States. These inadvertent errors do not affect the conclusions reached in this case.

We agree with the judge that the Union's failure to file objections to an election held in Case 3--RC--7578 did not constitute an admission of the absence of merit in complaint allegations about conduct which

(footnote continued)

using the phrase "working hours." We disagree with this analysis. We fail to see any meaningful distinction between "working time" and "the working time," or how the addition of "the" as a preface to

---

occurred during the critical preelection period. We disavow, however, any reliance on the judge's discussion of the reasonableness of the Union's actions. The failure to file objections has no legal relevance to the merits of unfair labor practice allegations involving Sec. 8(a)(1), (3), and (4), regardless of the reasons for such failure.

3 We agree with the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employees Reinhardt, Vincent, Styles, and Burkle. Her analysis is consistent with Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). See also Limestone Apparel Corp., 255 NLRB 722 (1981).

4 Essex International, 211 NLRB 749 (1974). The Board later partially overruled Essex in T.R.W. Bearings, 257 NLRB 442 (1981), holding that

(footnote continued)

"working time" causes that term to become ambiguous; nor do we believe that the employees would see any significance to this difference in wording. In either construction of the term we find that it "connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods." Our Way, 268 NLRB at 395. Accordingly, we shall dismiss the 8(a)(1) allegation with respect to the pre-1980 rule.

---

rules prohibiting employees from soliciting during "working time" without further clarification were, like rules prohibiting such activity during "working hours," presumptively invalid. However, the Board subsequently reversed T.R.W. and returned to the Essex standard. See Our Way, Inc., 268 NLRB 394 (1983). We also rely on Our Way in adopting the judge's finding that the Respondent's revised rule using the phrase "working hours" is presumptively invalid.

2. The judge also found that the Respondent violated Section 8(a)(1) by requesting that employees report on organizing activities. In part, the judge relied on a section of the Respondent's employee handbook. That section, entitled "Your Employee Rights Under a Union Organization Drive," includes a paragraph reading:

> Remember, do not sign a card because you are threatened, tell us and we will protect you. It is your right to have a union. It is your right not to have a union. Our Company will try to see to it that your rights are preserved no matter how you choose. Tell us if someone is trying to stop your freedom of choice.

The judge also relied on her findings that on several occasions during meetings with employees, District

Supervisor Korcz advised employees to report "harassment," "threats," or "trouble" to management officials including its attorney, and that Korcz also said that the Respondent's attorney would help the employees with respect to union harassment. The judge found that Korcz' comments to employees demonstrated that he subjectively equated "harassment" with solicitation of union support and the handbook's reference to "freedom of choice" with the absence of such solicitation and that therefore Korcz was inviting employees to report on union activities. The judge found that both the oral and written request for information were unlawful and cited S.E. Nichols of Ohio, Inc., 195 NLRB 939 (1972), in which the Board had found

similar invitations in the context of the corresponding section of the handbook to be violative of Section 8(a)(1).

We agree with the judge's analysis and findings with respect to the oral requests for information about "harassment" and "trouble." These words are vague and ambiguous in the context of union organizing and reasonably could encompass perfectly unlawful union efforts to persuade or even merely to inform employees about the asserted benefits of unionization. However, we disagree with the judge with respect to the quoted portion of the handbook and to Korcz' oral request for reports on "threats." We find that here the Respondent's request for information merely advised employees that the

Respondent would be available to protect employees from conduct that might restrain or coerce them in the exercise of their Section 7 rights. We note that in S.E. Nichols of Ohio the Board found it unnecessary, in the absence of a specific allegation, to pass on whether the handbook language was unlawful per se. Here, we must address the issue, and we find that the handbook provision is not reasonably subject to an interpretation that would unlawfully affect the exercise of Section 7 rights. Regardless of Korcz' equation in his mind of "freedom of choice" with no soliciting for the Union, there is no evidence that he explicitly expressed that view to the employees. We therefore shall dismiss

the 8(a)(1) allegation concerning the quoted portion of the handbook and Korcz' request for information on threats.

3. In addition to the provision quoted above, the handbook also includes the following paragraph:

> Do not sign a card because you are told that if you sign now, you will not have to pay initiation fees, and that non-signers will be forced to pay such fees if the Union gets certified.

The judge found that even though the underlining of the words "do not sign a card" in this paragraph deemphasizes the qualifications that follow, the admonitions by themselves fall within the permissible limits of Section 8(c) in that they contain no threat or promise of benefit. However, the judge went on to

consider these statements in the context of other statements found in the employee handbook. The pre-1980 version also admonished employees to "remember to stay out of problems, the only paper to sign is your pay receipt." The judge found that this was a coercive discouragement from signing authorization cards because the statement appeared in the section of the handbook which also stated that one company "benefit" was protection from "being exploited" or being taken advantage of by "outsiders" who most frequently were "Union Organizers."

The judge found that all these statements taken together against the background of the Respondent's other unfair labor practices constituted unlawful "brinksmanship" and thus

violated Section 8(a)(1). Although we agree with the judge that the now-deleted reference to signing only pay receipts is an implicit threat and thus a violation of Section 8(a)(1), we note that the judge does not mention that the handbook also states clearly, "So, if the union organizers call on you and you want the union, you should sign the card." Absent the pay receipt statement, the handbook in its entirety is not so unbalanced in its presentation to constitute interference, coercion, or restraint with respect to the employees' Section 7 rights. Accordingly, we shall dismiss the general complaint allegations regarding the handbook in its 1980 edition.[5]

---

[5] Contrary to our dissenting colleague,
(footnote continued)

4. At an 18 April 1980 employee meeting, District Supervisor Korcz repeated the earlier statements of Respondent's president, Manfred Brecker, that it was futile for employees to resort to the Board because the Respondent would win in the end. The

---

we affirm the judge's finding that the Respondent violated Sec. 8(a)(1) through Korcz' telling several employees that they could recall or withdraw authorization cards which they might have signed. Although Korcz did not explicitly "ask" employees to withdraw their cards, the judge correctly found Korcz' repeated comments to be coercive in the context of the Respondent's numerous contemporaneous unfair labor practices. The judge particularly noted that Korcz' "advice" was given following the four discriminatory discharges and that Korcz had attributed them in substantial part to the discriminatees' having solicited cards. In these circumstances, the employees could reasonably assume that Korcz was telling them to withdraw their support for the Union or risk the same fate as befell the discriminatees.

judge found that Brecker violated Section 8(a)(1) of the Act but made no findings with regard to Korcz. We find that Korcz' repetition of Brecker's statements also violated Section 8(a)(1) of the Act because it interfered with the employees' use of the Board and its processes. Scott's, Inc., 159 NLRB 1795, 1797--1798 (1966).

The judge also found that Korcz condoned the Respondent's use of unlawful campaign tactics, but did not specifically find that this conduct violated the Act. The record shows that on 24 April 1980 the Union sent employees a letter which stated that the Respondent was continuing its use of the "scare tactics" at the Herkimer store that it had used to defeat the Union at its Marcy

store, located 13 miles away. At an employee meeting 2 days later, Korcz acknowledged that the Respondent would continue to engage in the same conduct -- conduct that Korcz well knew was unlawful. See S.E. Nichols Marcy Corp., 229 NLRB 75 (1977). A continuation of the unlawful conduct at the Herkimer store had already resulted in the Respondent's discharging the four leading union adherents and engaging in numerous 8(a)(1) violations. We find that Korcz' threats to continue to engage in known unlawful conduct violated Section 8(a)(1) of the Act.[6]

---

[6] The judge found that the Respondent violated Sec. 8(a)(1) of the Act by Korcz' statements to employees that they could refuse to speak to Board agents investigating the case. The record fails to show, however, that Korcz or any of the Respondent's

(footnote continued)

5. Employees June Klimacek and Fred Pumilio informed Store Manager Robert Hathorn that they had received subpoenas from the General Counsel to appear at the March 1980 hearing in Case 3--CA--9304. Hathorn asked Klimacek if she knew what it was about, and she replied, "Not really." He also asked her if she had received any telephone calls about the subpoena and she answered in the negative. Later that day Hathorn spoke to Pumilio and "wondered" why the Board wanted him to testify. Pumilio said that he did not know and ignored Hathorn's repetition of the inquiry. The judge acknowledged that Hathorn did not directly interrogate either employee

---

representatives made such statements. Therefore we shall reverse and dismiss this 8(a)(1) allegation.

about his or her forthcoming testimony. However, she found Hathorn's "implied probing" to be coercive interrogation. We disagree and find no violation of Section 8(a)(1) of the Act. Hathorn's questioning of Klimacek and Pumilio was indirect, was not pressed following the employees' noncommittal or negative responses, and was totally unaccompanied by threats or promises. Accordingly, under Rossmore House, 269 NLRB 1176 (1984), we find Hathorn's behavior was noncoercive and thus we shall dismiss the allegation of unlawful interrogation based on it.

6. The judge found that the Respondent violated Section 8(a)(1) by "in effect" adopting certain remarks made at employee meetings on 18 April and 5

June 1980 by employee Edward Lintz. On 18 April at a meeting called by Korcz, during which other employees also spoke, Lintz spoke for approximately 15 minutes during which he stated that if the Union won the election, the store might close down or some employees would be laid off and remaining employees would have increased workloads. No other evidence was provided detailing the remainder of Lintz' comments. According to three witnesses, Korcz nodded his head in agreement during Lintz' speech. This event formed the basis of the allegation in the 8 May 1980 complaint in Case 3--CA--9714 that Lintz was the Respondent's agent whose statements violated Section 8(a)(1).

In the other incident, on 5 June, Brecker convened a meeting of all store employees and store officials during which he asked each individual named in the complaint as having committed a violation to rise and deny the allegations against him.[7] Lintz, who was named in the complaint, took the opportunity to repeat his comments of 18 April. Employee Klimacek specifically testified, however, that Brecker then told the assembled employees that Lintz

---

[7] We adopt the judge's finding that Brecker violated Sec. 8(a)(1) at the employee meeting on 5 June 1980. In so doing, we agree with her that Brecker's overall use of ridicule and parody directed at the Board and its agents was not itself unlawful, but that his specific request in this context of "manipulated hilarity" that three discriminatees also respond in the presence of their fellow employees to complaint allegations naming them was coercive and thus violated Sec. 8(a)(1).

was an employee and that anything he said was not a reflection on the Company. The judge acknowledged this summary disavowal of the Respondent's responsibility for or acceptance of Lintz' remarks but stressed that Brecker did not specifically deny their substance. It was on this latter basis, as well as her finding that the Respondent "permitted" Lintz to speak at length on 18 April and signified approval through Korcz' nonverbal behavior, that she found an adoption of Lintz' views by the Respondent.

Regarding Lintz' remarks on 5 June, we cannot agree that Brecker should have been required to go beyond a blanket disavowal of a rank-and-file employee's authority to speak for the Respondent in order not to be charged with adopting

each of Lintz' statements. Because Brecker's statement on 5 June was made directly following Lintz', the assembled employees could have no doubt that Lintz was speaking for himself on 5 June and did not bind the Respondent.

Concerning the earlier events on 18 April, Korcz testified that prior to the meeting he did not know that Lintz was going to speak or what he was going to say. According to Korcz, all employees in attendance were free to speak, were encouraged to do so, and several did take advantage of the opportunity. Although three of the employees observed Korcz "nodding" his head during unspecified portions of Lintz' 15-minute speech, this evidence is insufficient to indicate Korcz made such

a movement during that portion of the speech relied on as the basis of the complaint allegation. Moreover, the "nodding" of a listener's head during a speech, or in this case a series of speeches, is subject to interpretations other than "approval." Owing to this ambiguity there is an insufficient factual basis for finding ratification by the Respondent of Lintz' views on the effects of unionization. Accordingly, we shall dismiss the complaint allegations concerning Lintz without finding it necessary to consider whether his remarks themselves were violative of the Act if attributable to the Respondent.

7. In affirming the judge's conclusion that the Respondent violated Section 8(a)(4) by denying employee

Margaret Goldsmith a raise in retaliation for her testimony at a Board hearing, we find that contemporaneous raises given other employees, additional duties assigned to Goldsmith, and the comments of the Respondent's agents in denying Goldsmith's request for a raise establish that she ordinarily would have received a raise sometime in April or May 1979. We agree with the judge that this disparity in wage treatment was an act of unlawful discrimination.[8]

Remedy

---

8 As part of the backpay remedy pertaining to Goldsmith, the judge recommended that she also be made whole for wage losses suffered prior to 2 April 1980, the date on which the Respondent discriminatorily denied her a wage increase. We find no reason to commence Goldsmith's backpay period earlier than 2 April 1980, and we amend the recommended remedy accordingly.

We adopt the judge's recommended remedies with some modifications. We first agree that the extent of the 8(a)(1),[9] (3), and (4) violations warrants a broad cease-and-desist order,

---

[9] Contrary to our dissenting colleague we affirm the judge's findings that the Respondent violated Sec. 8(a)(1) by timing the announcement of a "shrinkage" bonus to influence the election and by offering to provide its own counsel to employees during their interviews with Board agents. Concerning the bonus announced 2 weeks before the election, there is no written statement of the policy underlying it and no evidence that the Herkimer employees had previously known of it. In particular, the judge found that the Respondent provided no evidence on the formula for determining a store's entitlement to a bonus or its timing and amount and no evidence that the Herkimer store has actually earned such a bonus. We therefore agree with the judge that the granting of the bonus to two nearby stores does not prove that the bonus was awarded pursuant to any established company policy. The judge correctly found that the Respondent failed to present a defense to the

(footnote continued)

reinstating the employees unlawfully discharged, and making employees whole for losses caused by the Respondent's unlawful conduct.[10] We further agree with the judge that certain additional

---

General Counsel's prima facie case. See NLRB v. Tommy's Spanish Foods, 463 F.2d 116 (9th Cir. 1972).

Concerning the offer of counsel, we agree with the judge's clear exposition of the reasons why the Respondent's offer is distinguishable from the statements found not coercive by the courts in Garry Mfg. Co., 630 F.2d 934 (3d Cir. 1980), and Florida Steel Corp., 587 F.2d 735 (5th Cir. 1979). Essentially, telling employees that they might need protection in an action against the Respondent would tend to dissuade them from cooperating with the Board. Secondly, here the Respondent did not recommend obtaining independent counsel but offered only its own attorney, thus, in the judge's words, "temptingly proposing a serious conflict of interests."

[10] In accordance with our decision in New Horizons for the Retarded, 283 NLRB No. 181 (May 28, 1987), interest will be computed at the "short-term Federal

(footnote continued)

remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found, to give S.E. Nichols employees an understanding of their Section 7 rights, and thereby to effectuate the remedial policies of the Act. Specifically, the judge is correct in concluding that the Respondent's prior history of violations at 5 of the other stores in its 43-store operation requires the imposition of extraordinary notice and access remedies.

The judge found that the Respondent's history before the Board and the courts[11] to be similar to that in the

---

rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[11] See S.E. Nichols Marcy Corp., 229 NLRB 75 (1977), enfd. by consent judgment No. 77--4154 (2d Cir. 1977); S.E.

(footnote continued)

J.P. Stevens line of cases and recommends, with modifications, the corporatewide notice and access remedies parallel to those ordered by the Board in J.P. Stevens & Co., 244 NLRB 407 (1979).[12]

Nichols Co., 156 NLRB 1201 (1966), enfd. in relevant part 380 F.2d 438 (2d Cir. 1967); S.E. Nichols-Dover, Inc., 159 NLRB 1071 (1966), enfd. 374 F.2d 115 (3d Cir. 1967); 165 NLRB 924 (1967); 167 NLRB 832 (1967), enfd. 414 F.2d 561 (3d Cir. 1969), cert. denied 397 U.S. 916 (1970); 179 NLRB 249 (1969), enfd. 73 LRRM 2816 (3d Cir. 1970), cert. denied 400 U.S. 831 (1970); S.E. Nichols of Ohio, Inc., 195 NLRB 939 (1972), enfd. 472 F.2d 1228 (6th Cir. 1972); NLRB v. S.E. Nichols of Ohio, Inc., 100 LRRM 2840 (D.C. Ohio 1978), affd. 592 F.2d 326 (6th Cir. 1979) (civil contempt); 258 NLRB 1 (1981), enfd. 704 F.2d 921 (6th Cir. 1983); S.E. Nichols Shillington Corp., 195 NLRB 189 (1972), enfd. 475 F.2d 1395 (3d Cir. 1973), cert. denied 414 U.S. 860 (1973). Unreported cases include: NLRB v. S.E. Nichols Shillington Corp., Civil Action No. 75--1751 (3d Cir. 1975) (contempt); DeProspero v. S.E. Nichols Marcy

(footnote continued)

The Respondent's many previous acts of misconduct over the 16-year period preceding the 1979-1980 unionization effort at the Herkimer store are detailed in the cases cited at

---

Corp., No. 76 CV 5 (D.C.N.Y. 1976) (10(j) injunction granted); Eisenberg v. S.E. Nichols, Inc., Civil Action No. 78--2613 (D.C.N.J. 1979) (10(j) injunction granted).

12 These include: (1) Posting of the Board notice in each store, to be signed by Brecker, Korcz, and the respective store manager; (2) mailing of the notice to each employee with an explanatory letter signed by Brecker; (3) a reading of the notice by Brecker in each store; (4) union access to bulletin boards in all stores during a 2-year period with access to last for 1 year from the date of request; (5) affording two union representatives access for 30-minute speeches within 10 days of any election scheduled at any S.E. Nichols store within 2 years; (6) affording any union an opportunity to be present at and to respond to any speech given by the Respondent at any store concerning union representation within the next 2 years; (7) furnishing unions with lists of the

(footnote continued)

footnote 11. In particular, in S.E. Nichols of Ohio, Inc., 258 NLRB 1 (1981), the Board stated that as of 1981 the Respondent's history of committing unfair labor practices clearly demonstrated that it had repeatedly committed unlawful acts in response to attempts to organize its stores. Specifically, with respect to the 8(a)(3) discriminatee at issue in S.E. Nichols of Ohio, whose original discharge was first found unlawful in 195

---

names, addresses, and classifications of employees at any store where an organizational campaign is being conducted and to keep such lists current at the end of each 6 months during a 2-year period. Additionally the judge recommended that the Respondent give each supervisor at its Herkimer, Marcy, and New Hartford, New York stores a copy of the notice and give written instructions to each supervisor concerning compliance with the notice and that the Respondent publish the notice in company publications and in newspapers in Herkimer and Utica, New York.

NLRB 939 (1972), the Board stated, "Scrutiny of this pattern of illegal conduct clearly indicates Respondent's bad faith in complying with the Board's and the court's remedial orders." The judge in the instant proceeding is therefore justified in characterizing the Respondent as a "recidivist" who has at the Herkimer store continued to engage in an "obdurate flouting of the Act."

We join the judge in noting the repetitions of President Brecker's attacks on the Board's neutrality through his telling employees that the Board favored unions and unionization, and we affirm her conclusion that extraordinary notice and access remedies are necessary to "clear the atmosphere poisoned by Respondent's unrelenting, egregious and

pervasive trampling on its employees' statutory rights." We disagree, however, with the judge's recommendation that the extraordinary remedies be applied corporatewide to all 43 stores in the Respondent's operation. The massive multiplant violations by J.P. Stevens are not parallel to S.E. Nichol's history, which involves a smaller number of proceedings, each restricted to one facility. Although it is true that never before with this Respondent have we found it appropriate to extend the geographical scope of the notice and access remedy beyond the individual stores where the violations occurred, we will this time approve a limited expansion to encompass all eight stores in the corporate

division supervised by Henry Korcz.[13] In our view this remedy is proportionate to the violations, when viewed in historical context. Accordingly, the judge's recommended Order is modified below.[14]

---

[13] The record shows that President Brecker personally participated in unfair labor practices at four other stores prior to the events at Herkimer, two of them located in District Supervisor Korcz' district, and Korcz joined him at one of them. We find, however, no evidence to support the judge's suggestion that their various career promotions over the years have been at least in part intended as corporate "rewards" for their misconduct under the Act. Korcz supervises five stores in upstate New York (New Hartford, Marcy, Herkimer, Gloversville, and Amsterdam) and three stores in Ohio (Wooster, Ashtabula, and New Philadelphia).

[14] We do not adopt the judge's recommendation that the Respondent publish the notice in company publications and in local newspapers in Herkimer and Utica, New York. We find such publication is unnecessary because the posting and reading of the notice will properly and fully inform employees of the Respondent's violations.

ORDER

The National Labor Relations Board orders that the Respondent, S.E. Nichols, Inc., Herkimer, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of employment, loss of benefits, or increased work duties if they choose to be represented by a labor organization.

(b) Soliciting employee complaints and grievances and promising to remedy them.

(c) Promising employees any wage increase, bonus, or other benefits to discourage membership in or support of any labor organization.

(d) Soliciting employees to withdraw or retract their authorizations for union representation.

(e) Coercively directing or advising employees not to sign union authorization cards or any papers other than pay receipts.

(f) Telling employees that the Respondent or its counsel would learn the identity of employees who signed union cards.

(g) Telling employees that discriminatorily discharged employees had not been and would not be reinstated or that any such employees who are reinstated will not remain in the Respondent's employ.

(h) Promulgating, maintaining, or enforcing any rule prohibiting employees from soliciting or distributing written materials on behalf of any labor organization during working time without affirmatively and clearly specifying the times during which employees may lawfully engage in such activities.

(i) Imposing or enforcing any restriction or limitation on solicitation and distribution by any employee on behalf of any labor organization greater than restrictions on solicitation or distribution by employees for any other purpose.

(j) Telling employees that an employee was discharged or engaging in protected concerted activities.

(k) Keeping in effect or distributing its employee handbook (or any past or future version thereof) so long as it contains its present rules concerning solicitation and distribution or the advice that employees sign no papers other than pay receipts found in the section entitled "Employee Rights & Unions---Your Employee Rights and Legal Rights under a Union Organization Drive."

(l) Expressing approval of, and threatening to engage in, conduct similar to that which has previously been found to violate the Act.

(m) Withholding wage increase from any employees because they have testified on behalf of the General Counsel in a Board proceeding or because they support a labor organization.

(n) Discharging, embarrassing and ridiculing, disciplining, or subjecting to increased supervision or otherwise discriminating against any employees because they have testified in any Board proceeding, have been named in any unfair labor practice charges or complaints, or because they support or have supported any labor organization or have engaged in protected concerted activities.

(o) Soliciting employees to inform the Respondent of the union or other protected activities of other employees.

(p) Offering the assistance of the Respondent's counsel to employees in connection with Board investigations or proceedings.

(q) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dorothy C. Reinhardt, Douglas Vincent, Kristin Burkle, and Denise Styles immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss

of earnings and other benefits suffered as a result of the discrimination against them.

(b) Grant Margaret Goldsmith a wage increase of not less than 15 cents per hour.

(c) Make all the employees whole for any loss of pay they have suffered by reason of the Respondent's discrimination against them in the manner set forth in the remedy section of the judge's decision and this Decision and Order.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports,

and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Remove from its records and destroy all references to the written warnings given to employee Fred Pumilio on 26 March 1980 and to employee June E. Klimacek on 7 April 1980 and to the discharges of Dorothy Reinhardt, Douglas Vincent, Kristin Burkle, and Denise Styles. Notify each of the discriminatees in writing that this has been done and that their respective disciplines will not be used against them in any way.

(f) Remove from its employees' handbook the rules concerning employees solicitation and distribution of literature.

(g) Post in conspicuous places at all its stores in the corporate district supervised by Henry Korcz, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 3, after being duly signed on behalf of the Respondent by President Manfred Brecker, by Henry Korcz, and by the highest managerial official of the store in which the notice is posted, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicuous places including all

---

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Reproduce and mail to the home of each of its employees at all its stores in Korcz' district a facsimile of the signed notice, together with a letter appended hereto as "Appendix B." The letter shall be reproduced on the Company's regular business stationery and signed by President Brecker and by the highest official of the recipient's store. The Respondent shall provide the Regional Director for Region 3 with proof of such mailing.

(i) Reproduce and give to each supervisor at its Herkimer, Marcy, and New Hartford, New York stores a facsimile of the notice, and give written instructions, signed by the highest official at each store, to each supervisor to comply with the provisions of the notice. The Respondent shall provide the Regional Director for Region 3 with proof of compliance with this paragraph.

(j) At such reasonable time after the entry of this Order as the Board may request, convene during working time all its employees in each of its stores in Korcz' district and also the supervisors at the Herkimer stores, and have the notice read by President Manfred Brecker.

The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at all such meetings.

(k) On request of a union, made within 2 years from the date hereof, immediately grant such union and its representatives reasonable access to the store bulletin boards and all places where notices to employees are customarily posted, at each of the Respondent's stores in Korcz' district for a period of 1 year from the date of request.

(l) In the event that during a period of 2 years following entry of this Order any supervisor or agent of the Respondent convenes any group of employees at any of the Respondent's stores in Korcz' district and addresses

them on the question of union representation, give notice to any union attempting to organize the employees and afford two union representatives a reasonable opportunity to be present at such speech and, on request of the representatives, permit one of them to address the employees for the same amount of time as the Respondent's address.

(m) If within the next 2 years the Board schedules an election at any of the Respondent's stores in Korcz' district then, on request by any participating union, afford at least two representatives of such union reasonable access to each of the Respondent's stores and appropriate facilities to deliver a 30-minute speech to employees on working

time, the date to be within 10 working days before but not within 48 hours prior to any such election.

(n) On request of a union immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees at any store in Korcz' district where the Union is conducting an organizing campaign, as of the latest available payroll date, and furnish a corrected, current list to such union at the end of each 6 months thereafter during the 2-year period referred to above.[16]

---

16 If either Brecker or Korcz no longer occupies the position he held during the commission of the unfair labor practices found herein, then the specific obligations set forth in paragraph 2 of this Order shall be carried out by the individual currently holding that position.

(o) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint for which no violations have been found are dismissed.

Dated, Washington, D.C. 23 June 1987

Wilford W. Johansen, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting in part.

Contrary to my colleagues, I would not adopt the judge's findings that the Respondent violated Section 8(a)(1) by telling employees it would help them with "trouble" and union "harassment"; by instructing employees not to sign authorization cards; by soliciting employees to withdraw authorization cards they may have signed; by the granting of a shrinkage bonus; and by the offer to provide counsel to employees. I further disagree with the majority's granting of extraordinary access and notice remedies.

1. On several occasions during the union organizing campaign, District Supervisor Korcz advised employees to report "threats," "trouble," or "harassment" to management and told them

that the Respondent's attorney would help them "as far as the union harassing" them. During this period the employee handbook contained a request to report "threats" associated with organizers' attempts to secure signed authorization cards. The judge found that by these oral and written statements the Respondent violated Section 8(a)(1) by soliciting employees to report on union organizing activities. I agree with the majority's finding that the handbook provision is not unlawful in that it contains no threat or promise of benefit and thus is protected by Section 8(c) of the Act.

For the same reason, I agree with my colleagues' adoption of the judge's finding with respect to the oral

statements of Korcz about "threats." They, like the handbook, only seek to inform employees that the Respondent stands ready to assist them if they should be faced with unprotected union actions in violation of Section 8(b)(1)(A). I disagree, however, with the finding of a violation with respect to Korcz' statements about "trouble" and "harassment" for the reason just set forth. Accordingly, I would dismiss this complaint allegation in its entirety.

2. The majority adopts the judge's finding that the Respondent violated Section 8(a)(1) by maintaining in its pre-1980 edition of the employee handbook the closing statement admonishing employees to "remember to stay out of problems, the only paper to

sign is your pay receipt." The judge found that this was a coercive discouragement from signing authorization cards since the statement appeared in this section of the handbook which also stated that one company "benefit" was protection from "being exploited" or taken advantage of by "outsiders" who most frequently were "Union Organizers." My colleagues have adopted this finding relying at least in part on the judge's analysis of the handbook. As my colleagues acknowledge, however, the judge does not mention that the handbook also clearly states in this section, "So, if the union organizers call on you and you want the union, you should sign the card." Thus, even with the pay receipt statement, the handbook is thus not so

unbalanced in its presentation as to constitute any interference, coercion, or restraint with the employees' Section 7 rights. I would therefore dismiss this complaint allegation.

3. The judge finds, and my colleagues agree, that the Respondent further violated Section 8(a)(1) by "soliciting" employees to withdraw authorization cards which they may have submitted to the Union. Korcz told several employees that if they signed cards they were entitled to recall or withdraw them. Employee testimony supports his claim that at no time did he either directly or indirectly ask them to do so and the judge concedes that in fact no "solicitation" took place. The handbook, to which Korcz referred in his

conversations with employees, merely advises employees that if they change their minds after signing a card they have the right to do so. In my view, both the handbook and the oral statements of Korcz were simply informational in nature, correct as a matter of law, devoid of any threat or promise of benefit and thus protected under Section 8(c). Since I see no realistic possibility that employee coercion could have resulted from Korcz' volunteered comments, I would dismiss this complaint allegation.

4. Two weeks before the election in June 1980, the Respondent's president, Manfred Brecker, announced that the Herkimer store employees would receive a $2000 "shrinkage bonus" to be divided

among employees and supervisors. The judge found, and my colleagues agree, that the Respondent violated Section 8(a)(1) of the Act by timing this benefit announcement unlawfully to influence the election. I disagree. The undisputed testimony of District Manager Henry Korcz shows that the Respondent's policy was to grant such bonuses to any store in its chain that improved its record with respect to losses from theft or improper handling. Two other stores in the same geographical area as the Herkimer store had recently earned and received this bonus. The General Counsel has neither alleged nor presented evidence that the bonus as announced was either not earned or not in accordance with the Respondent's normal business practice.

Thus, because the shrinkage bonus was a benefit that the Respondent could lawfully grant, it cannot be an unfair labor practice to announce it. Cardivan Co., 271 NLRB 563 (1984).

5. During the Regional Office's investigation of the charges in Case 3--CA--9304, Korcz told employees that Board agents would be visiting the store and might want to interview them. Korcz testified that he further told employees that if they needed help during the interviews they could see the Respondent's attorney. Relying primarily on Florida Steel Corp., 233 NLRB 491 (1977), enf. denied 587 F.2d 735 (5th Cir. 1979), and Garry Mfg. Co., 242 NLRB 539 (1979), enf. denied in relevant part 630 F.2d 934 (3d Cir. 1980), the judge found, and my

colleagues agree, that the Respondent violated Section 8(a)(1) of the Act by offering employees the assistance of its attorney during interviews with Board agents. For the reasons set forth below, I am persuaded by the reasoning of the United States Court of Appeals for the Fifth and Third Circuits, respectively, in denying enforcement in Florida Steel and Garry Mfg.[17] Accordingly, I would overrule the Board's decisions in those cases and dismiss the 8(a)(1) allegation as to Korcz' offer to provide legal assistance to the Respondent's employees.

---

[17] The Board in Garry Mfg. relied on its decision in Florida Steel and the Third Circuit in turn relied on the Fifth Circuit's reasoning in Florida Steel in denying enforcement to the Board's order.

In Florida Steel the company distributed a letter during the Board's investigation of the unfair labor practice charges advising employees that they had a right to consult with counsel before talking to the Board agent and that the company would recommend an attorney to any employee who so desired. The Fifth Circuit held, contrary to the Board, that the letter was protected under Section 8(c) of the Act in that it was not coercive and contained no threat of reprisal. Further, the letter neither required nor compelled any employees to report to or consult with the company regarding the obtaining of counsel. The letter made it clear that any action employees took with respect to obtaining counsel or talking to a Board agent was

entirely optional with them. Finally, the letter offered assistance without regard to the positions employees took with respect to the union or talking with the Board agent.

Because Korcz' statements to employees contained no threat of reprisal or promise of benefit, they too were protected under Section 8(c). Korcz demanded nothing of his employees, but merely offered the assistance of the Respondent's attorney to any employee who wanted it without any inquiry into their positions with respect to the Union's organizing campaign. Accordingly, in the absence of any coercive impact flowing from Korcz' offer, I would dismiss this 8(a)(1) allegation.

6. I agree with my colleagues that despite the Respondent's history of unfair labor practices, the corporatewide access and notice remedies ordered by the judge are inappropriately broad with respect to the violation, limited to its Herkimer store, specifically found in this proceeding. I part company with them, however, to the extent they order any additions to the conventional remedies to the 8(a)(1), (3), and (4) violations herein (a broad cease-and-desist order, reinstatement of employees unlawfully discharged, the making whole of employees for losses caused by the Respondent's unlawful conduct, and the normal notice posting).

The majority agrees with the judge that the Respondent's prior history of violations at 5 of its other 43 stores requires the imposition of extraordinary notice and access remedies, but limits the imposition of these remedies to the 8 stores supervised by Korcz. This remedy is ordered with the majority's acknowledgment that the Board has not, in prior cases involving this Respondent, extended the scope of the notice and access remedy beyond the individual store where the violations occurred. Unfortunately, my colleagues have offered no reason why such an extension is appropriate here.

Unlike the pattern of misconduct in the J.P. Stevens case there is no evidence that the unfair labor practices

found in previous S.E. Nichols cases currently remain unremedied, and no evidence that corporate policy ever led to extensive and detailed publicizing of its illegal activities at any one store to employees of any other store. The record contains neither allegation nor proof that the unlawful activities at the Herkimer store herein affected the employees at any of the Respondent's other locations. Similarly, there is no evidence that the Union experienced access problems during the relevant timeframe. To compare this Employer's unfortunate but limited history of unfair labor practices to the widespread and pervasive practices engaged in by J.P. Stevens defies common sense. The judge, in making such a comparison and ordering

the same remedies as were ordered in J.P. Stevens & Co.[18] appears to have been unduly influenced by the Respondent's belief that the Board was not "neutral." While the Respondent's impressions of the Board are unfortunate, we cannot allow them to serve as a justification for punishing the Respondent through punitive remedies that far outreach the specific violations herein. Likewise, the Board should not allow the use of a respondent's history of unlawful conduct as a per se justification for punitive remedies that do not specifically address the unfair labor practices found in a particular case. The majority's imposition herein of extraordinary remedies in all of the stores in Korcz'

---

[18] 244 NLRB 407 (1979).

division represents just such a practice. Because in my view the record here does not support a finding that even divisionwide remedies are necessary to offset the coercive effects caused by the Respondent's conduct at issue in this proceeding, I would require only the conventional remedies detailed in the Order.

Dated, Washington, D.C. 30 June 1987

Donald L. Dotson, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of employment, reduction in benefits, or increased work assignments if you choose to be represented by a union.

WE WILL NOT solicit your grievances or complaints and promise to adjust them in order to interfere with your union activities.

WE WILL NOT promise any wage increase, bonus, or other benefits in order to discourage you from seeking union representation.

WE WILL NOT solicit you to withdraw or retract authorizations for union representation which you have executed.

WE WILL NOT direct you or coercively advise you not to sign union authorization cards or any papers other than pay receipts.

WE WILL NOT tell you that we will learn the identity of any of you who sign a union authorization card.

WE WILL NOT tell you that discriminatorily discharged employees will not be reinstated or that any such employees who are reinstated will not remain in our employ.

WE WILL NOT tell you that an employee was discharged for engaging in protected concerted activities.

WE WILL NOT restrict your right to solicit or to distribute written or printed material on behalf of any labor

organization without clearly telling you when you may lawfully engage in such activities.

WE WILL NOT impose any greater restriction on the solicitation or distribution or receipt of written or printed material on behalf of a union than is imposed on all other forms of solicitation or distribution and receipt of material.

WE WILL NOT withhold wage increases from any of you because you have testified in a Board proceeding or because you support labor organization.

WE WILL NOT indicate to you that we approve of or will repeat any type of conduct by which the Board has determined that we have previously violated the National Labor Relations Act.

WE WILL NOT ask or solicit any of you to report to or inform us of the union or other protected concerted activity of other employees.

WE WILL NOT offer to you the assistance of our attorney in connection with Board investigations or proceedings.

WE WILL NOT discriminate against you because you have engaged in union or protected concerted activities or because you have testified in National Labor Relations Board hearings or have been named in any charge or complaint before the Board, or to discharge membership in or support of any labor organization. Specifically, WE WILL NOT discriminate against any of you by discharging you; reprimanding, warning, or disciplining you, withholding wage increases from you,

subjecting you to increased supervision; subjecting you to ridicule or embarrassment; or in any other manner.

WE WILL offer Dorothy C. Reinhardt, Douglas Vincent, Denise Styles, and Kristin Burkle immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL pay each of these four employees for any earnings and other benefits they lost as a result of our discrimination against them less any net interim earnings, plus interest.

WE WILL give Margaret Goldsmith a wage increase and pay her, with interest, for any loss she suffered as a result of our having previously withheld a wage increase from her.

WE WILL notify Fred Pumilio and June Klimacek that we have removed from our files any references to the written warnings given them on 26 March and 7 April 1980, respectively. WE WILL notify Dorothy Reinhardt, Douglas Vincent, Denise Styles, and Kristin Burkle that we have removed from our files any references to their discharges. WE WILL also notify all these employees that their discipline will not be used against them in any way.

WE WILL rescind and withdraw from our employees' handbook and rules concerning employees' solicitation and distribution of literature.

WE WILL withdraw our employee handbook from distribution and circulation until such time as the portions referred to above have been physically deleted.

WE WILL, for 2 years, give all our supervisors at our Herkimer, Marcy, and New Hartford, New York stores copies of this notice and instruct them to comply with its provisions.

WE WILL grant to any union access to our bulletin boards, list of the names and addresses of our employees and, as

ordered, speaking opportunities at any store at which the requesting union is attempting to organize our employees.

WE WILL send to all of our employees copies of this notice, with an explanatory letter; and WE WILL read this notice to all our employees.

S.E. NICHOLS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

Dated _____ By _____
(Manfred Brecker)
(President)

Dated _____ By _____
(Henry Korcz) (Division Manager)

Dated _____ By _____
(Store Manager)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 901, 111 West Huron Street, Buffalo, New York 14202, Telephone 716-846-4951.

APPENDIX B

Dear Nichols Employees:

Pursuant to an order of the National Labor Relations Board, this letter and enclosed notice are being sent to assure you that your rights as employees under the National Labor Relations Act will be honored and protected.

The National Labor Relations Board has found that, since 1965, we have violated the rights of our employees in the course of union organizing campaigns in our stores in Dover, Delaware; Shillington, Pennsylvania; New Philadelphia, Ohio; and Elmira and Marcy (Utica), New York. When these decisions by the National Labor Relations Board have been appealed, the United States

circuit courts of appeals have affirmed them. We have also been held in contempt of court for violating such orders at our New Philadelphia, Ohio, and Shillington, Pennsylvania stores. In addition to the cases referred to above, on our settlement agreements, orders have been issued against us for our conduct in connection with a union campaign at our store in Matawan, New Jersey. Most recently it has been held that we violated the National Labor Relations Act in a union organizational campaign at our store in Herkimer, New York.

The Board has held that, in large part, our campaigns have followed much the same general pattern in all union organizational campaigns. The pattern, as reflected in the enclosed notice,

includes, among other things, discharge of employees who attempt to unionize; discrimination in various ways against employees who support a union or who cooperate with the National Labor Relations Board in investigating and prosecuting cases against us; threats of detriment to employees who choose to be represented by a union; promises of benefits to discourage employees from choosing union representation; restriction of employees' legal rights to solicit for and distribute literature on behalf of unions.

In the situation that occurred at Herkimer, it has been found that we have interfered with investigations by the National Labor Relations Board and that we have improperly led our employees to

believe that the Board is interested in supporting unions but is unable and unwilling to protect the rights of employees under the Act. We disavow any such statements and implications. The Board is open to all persons who believe that any violation of the National Labor Relations Act has been committed and the Board is required to protect the rights of all persons under the Act.

We may, of course, exercise our right to free speech concerning union matters. However, we assure you that we will make every possible and sincere attempt to keep our conduct within proper bounds. We want you to know that you are entirely free to consult the National Labor Relations Board if at any time you believe we may have violated your rights

under the National Labor Relations Act. We will not unlawfully inquire about or otherwise interfere with any contacts, direct or indirect, you have with the Board.

Very truly yours,

Manfred Brecker, President

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

S. E. NICHOLS, INC.

and Cases Nos. 3-CA-9304
3-CA-9714

LOCAL NO. 1, UNITED
FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION, AFL-CIO

INDEX TO ADMINISTRATIVE LAW
JUDGE'S DECISION

Findings of Fact 8
I. Preliminary Findings 8
II. Alleged Unfair Labor
Practices 10
A. Section 8(a)(3)
Discharges 10
1. The General Counsel's
case 10
a. The evidence 10
b. Discussion and
conclusions 25
2. Respondent's defense . . 32
a. General matters . . 32
b. Dorothy C.
Reinhardt 35

c. Douglas Vincent . . 49
d. Denise Styles and Kristen Burkle . . 59
B. Section 8(a)(1) 71
1. General comments 71
2. Specific allegations . . 73
a. Threat of discharge . 73
b. Solicitation of complaints with promise of ratification . . 75
c. Promise of wage increases 83
d. Solicitation of employees to withdraw union authorization cards 86
e. Threat of loss of benefits 93
f. Threat of company knowledge of union cards 97
g. Threat to discharge discriminatees if reinstated 99
h, i and l 101
j. Request for employee reports of union activities 114
k. Instructing employees not to sign union cards 117
m. Offer to provide counsel in employee interviews with Board agents 121
C. Case No. 3-CB-9714 141
1. Preliminary considerations 117
2. The alleged violations . 121

a. Section 8(a)(1) . . . 151
(1) Conduct of President Manfred Brecker 151
(a) Credibility . 152
(b) The alleged violations . . . 155
(2) Conduct of division supervisor Henry Korcz . . 171
(3) Store Manager Robert Hathorn 175
(4) Edward Lintz . . 183
(5) Shrinkage bonus . 187
b. Section 8(a)(3) and (4) 187
(1) June E. Klimacek . . . 187
(2) Margaret Goldsmith . . . 204
(3) Fred Pumilio . . 220
Conclusions of Law 232
The Remedy 236
ORDER 261
APENDICES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

S. E. NICHOLS, INC.

and Cases No. 3-CA-9304
3-CA-9714

LOCAL NO. 1, 1/UNITED
FOOD AND COMMERCIAL
WORKERS INTERNATIONAL
UNION, AFL-CIO

1/ The charge in Case No. 3-CA-9304 was filed by Retail Store Employee's Union Local 345, United Food and Commercial Worker's International Union, AFL-CIO. However, union organizer Mark Alexander testified, without contradiction, that Local 345 was merged with Local 1 of the International in November 1979. Although the representation petition was filed by Local 345, the election was held and the certification was issued with Local 1 named as the petitioning labor organization. Accordingly, although no motion has been filed, I have corrected the caption of the consolidated proceeding to show that Local No. 1 is now the Charging Party in both cases.

Thomas J. Sheridan, Esq. and Alfred M. Norek, Esq., Albany, NY, for the General Counsel.
Harold Cohen, Esq., Rochester, NY, for the Charging Party.
Leonard W. Wagman, Esq., Stephen M. Rathkopf, Esq., and Robert S. Goodman, Esq. (Golenbock and Barell), New York, NY, for the Respondent.

DECISION

JOSEPHINE H. KLEIN,

Administrative Law Judge: Pursuant to a charge filed by Retail Store Employees Union Local 345, United Food and Commercial Workers International Union, AFL-CIO, on September 7, 1979,[2/] a complaint was issued against S. E. Nichols, Inc. (the Company or Respondent) on October 10 (amended on March 5, 1980), alleging that, as its store in Herkimer,

---

2/ Unless otherwise specified, all dates are in the period August 1979 through June 1980.

New York, Respondent has maintained an unlawful rule prohibiting employees' accepting literature on company property; in September, during a union organizing campaign, Respondent committed numerous acts of misconduct in violation of Section 8(a)(1) of the Act;[3/] and on September 3 and 4 Respondent discharged employees Douglas Vincent, Dorothy Reinhardt, Denise Styles and Kristin Burkle in contravention of Section 8(a)(3) and (1) of the Act. Pursuant to due notice, a trial on the complaint was held before me in Utica, New York, on March 17, 18 and 19, 1980. Thereafter, briefs were filed on behalf of the General Counsel and the Respondent.

3/ National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq.

On April 2, 1980, Local No. 1 (the Union; see footnote 1), filed an additional charge against Respondent, pursuant to which a complaint was issued on May 8 (and amended on June 11 and September 3),[4/] alleging that on various occasions between March 7 and June 6, 1980, Respondent engaged in numerous acts violative of Section 8(a)(1) and (3) of the Act at its store in Herkimer, New York. On May 12, 1980, the General Counsel moved to reopen the hearing in Case No. 3-CA-9304 and to consolidate that case with the second complaint (Case No. 3-CA-9714) for further hearing. The

---

4/ Three amendments were made on September 3, 1980. The second amendment was withdrawn at the hearing on September 15. The third amendment merely requests detailed remedial provisions in any order to be issued against Respondent.

Regional Director also petitioned the United States District Court for the Northern District of New York for an injunction against Respondent under Section 10(j) of the Act. (No. 80-CV-467).

On June 18, 1980, an election was held pursuant to the Union's petition, filed on September 7, 1979. The Union lost the election and no objections were filed.

On July 3, 1980, I granted the General Counsel's motion to reopen the record and consolidate the two complaints and scheduled a hearing for September 15, 1980. On July 8, 1980, at the conclusion of a 4-day trial, District Court Judge Neal P. McCurn denied an injunction. The

General Counsel's appeal from Judge McCurn's decision is pending in the Court of Appeals for the Second Circuit.

At the hearing convened before me in Utica, New York, on September 15, 1980, I granted the request of counsel for all parties that I accept the transcript of the District Court trial in lieu of direct evidence. The record before me, consisting of the District Court record supplemented by stipulations and arguments of counsel, was closed as of September 25, 1980. Supplementary post-trial briefs have been filed by the General Counsel and Respondent.

Upon the entire record,5/

5/ The General Counsel's unopposed motion to correct the transcript in Case No. 3-CA-9304 is hereby granted, with the following exceptions and comments: One requested correction is changing "didn't" to "did" in line

careful observation of the witnesses who testified before me, and consideration of the briefs of the General Counsel and the Respondent, I make the following:

(footnote continued from previous page)
14 of page 121. Since the word "didn't" does not appear at the place stated, the requested correction cannot be made. The General Counsel also requested that at two points the spelling of a union business agent's last name be changed from "Giannone" to "Ginnone." There is no reason to doubt the accuracy of the General Counsel's spelling, and the requested corrections will be made. However, a related correction must be made throughout the transcript. The transcript contains frequent references to the former manager of Respondent's Herkimer store. He is also referred to as Mr. "Ginnone." However, other evidence and the transcript of the District Court trial show that his last name actually is "Genung." The transcript of the trial in Case No. 3-CA-9304 is hereby corrected by changing "Ginnone" to "Genung" whenever reference is being made to the manager of Respondent's Herkimer store before August 17, 1979.

There are numerous other errors in

Findings of Fact

I. Preliminary Findings

A. Respondent, a New York corporation with its principal office and place of business in New York, New York, maintains several stores in New York State and in other states, including a store in Herkimer, New York, where it is engaged in the retail sale and distribution of various products. In the course of its business operations at the Herkimer store, Respondent annually sells

---

(footnote continued from previous page) the transcript of the trial in Case No. 3-CA-9304. However, no further corrective order is being issued because most of the errors are insubstantial and/or self-evident, while other portions are so garbled as to render it impossible to reconstruct precisely what words were used. Obvious errors (such as spelling and punctuation) have been corrected in some quotations in this Decision.

and distributes products valued in excess of $500,000 and receives goods valued in excess of $50,000 directly from points outside the State of New York. Respondent is now, and was at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. Local No. 1, United Food and Commercial Worker's International Union, AFL-CIO (including Local No. 345; see footnote 1), is and was at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Section 8(a)(3) Discharges

1. The General Counsel's case

a. The evidence

Respondent operates some 42 discount department stores in upper New York State, Pennsylvania and Delaware. The present case involves the store in Herkimer, New York.

On Friday, August 17, 1979, apparently without any prior indication, Henry Korcz, Respondent's district supervisor, announced at a meeting of the approximately 70 employees that Lyle Genung had been discharged as store manager, a position he had apparently held for many years. Genung apparently had been well liked by the store's employees, many of whom were shocked and

upset by his summary dismissal. At least some of the employees immediately became concerned that the sudden discharge of a long-term store manager meant that no company employees had reasonably reliable job security.

Alleged discriminatee Dorothy C. Reinhardt, who had worked in the Herkimer store for 11 years, was so upset by the announcement of Genung's discharge that she left the employee meeting before its conclusion. That evening she and alleged discriminatee Doug Vincent, who had been employed by Respondent for about 5 3/4 months, discussed the Genung discharge and agreed that it would be wise to consider getting a union for protection of the employees. Reinhardt testified that the next day, her

immediate supervisor, Peter Bifora, manager of the store's home center, told her that he might also be fired.6/ Thereupon, Reinhardt spoke to another employee in the home center about the advisability of unionizing. The next day Reinhardt started a scheduled 1-week vacation.

On Monday, August 20, Robert Hathorn, who until then had been assistant manager of Respondent's store in New Philadelphia, Ohio, arrived at the Herkimer store to replace Genung. No employee meeting was called to introduce Hathorn but apparently he was introduced to some individual employees as they reported to work. Several employees soon expressed displeasure that Hathorn had

6/ Bifora did not deny this testimony by Reinhardt.

almost immediately begun to give orders and call employees to the office without even having been properly introduced.

On Wednesday, August 22, Reinhardt, on her own initiative, interrupted her vacation and worked at the store all day without compensation. She heard some employee complaints about Hathorn. She also observed Hathorn treat employees in what she considered an improper manner, causing one employee to cry. Reinhardt then spoke about the matter to Bifora and to Linda Abramczyk, a district supervisor, under Korcz. Thereafter Abramczyk introduced Hathorn to Reinhardt. Hathorn apparently was very cordial and told Reinhardt that he had heard that she was a good worker. When she spoke of her desire to become an

assistant manager, he said that vacancies often occurred and that all she needed to do was keep up her good work.7/ Later that day Reinhardt indicated to Abramzcyk that perhaps Reinhardt had judged Hathorn too hastily.

Korcz remained at the store with Hathorn on August 20 through 24. For that week, the work schedules designated by Genung were left undisturbed. Korcz spent the next week visiting stores in Ohio, but apparently spoke with Hathorn on the telephone on occasion.

During her vacation, Reinhardt spoke to Nick Giannone, an organizer for the Union, but no definite plans were made for a future contract.

7/ There is no contention that Hathorn promised a promotion.

On August 31, alleged discriminatees Denise Styles and Kristin Burkle, security employees, had lunch with a fellow employee and Alvin Madison, an assistant-manager-trainee, admittedly a supervisor. Styles and Burkle testified that they spoke about the possibility of unionization and asked Madison if he would sign a union card or petition if it were available. According to Styles, Madison said he would sign. Madison testified that he had said he did not know whether he would sign. He also testified that Styles and Burkle spoke about a possible walkout. I credit Styles' denial that they mentioned a walkout, because the evidence as a whole shows that consideration of a walkout did not arise until after lunch.

On returning to the store after lunch on August 31, Styles and Burkle saw a new work schedule posted, under which their hours were to be increased from 38 to 40 per week, but they were to work 6 days a week rather than the 5 days they had been working. They immediately went to see Hathorn, who spoke to them individually. He said they would have to observe the new schedule for 3 weeks, after which he would decide whether to make it permanent. Burkle testified that she also inquired about her 6 months wage increase and was told that she would receive it "in a couple of weeks."

Styles and Burkle thereupon agreed to try to arrange an employee walkout at noon the next day. Styles who was then running a cash register in place

of an absentee, spoke to 12 to 15 employees, mainly on the store intercom telephone. Burkle also spoke about the matter with several employees at her security post. Around 10 employees agreed to join a walkout.

Reinhardt soon learned of the proposed walkout and informed Bifora, her supervisor. He told her to dissuade the employees from such action and she agreed to do so. Bifora testified that he had confidence in Reinhardt's ability to forestall the walkout and therefore did not inform his superiors of the plan. Madison testified that during that afternoon he overheard Reinhardt say that "[t]hey should get a union started." Madison denied that he informed his superiors of this occurrence.

Reinhardt advised the employees against walking out, warning that it might end their employment and remove any possibility of unionization. Styles and Burkle were willing to drop the planned walkout, if Reinhardt actually got in touch with a representative and initiated organizational activity rather than simply continuing to talk about it.

Alleged discriminatee Vincent, who was not scheduled to work on Friday, August 31, visited the store that afternoon to pick up his pay stubs. At that time Reinhardt informed him of the planned walkout and requested that he made immediate contact with a union representative. That evening, after Reinhardt finished work, she and Vincent met with union organizers Mark Alexander

and Giannone, from whom they received blank authorization cards. Reinhardt and Vincent then returned to the store, where they had some cards signed and gave blank cards to Styles, who also obtained four signatures that evening.

On Saturday, September 1, Styles spoke to employees, informing them of the incipient union organization and calling off the planned walkout. Styles testified that when she asked Madison to sign a card, he asked where she had got the cards, and she replied that Reinhardt and Vincent had obtained them. According to Styles, Madison said that, having discussed the matter with the wife, he would not sign a card until he had spoken with Korcz. Madison denied having had that conversation. However, I credit

Styles. This credibility resolution is based on two main factors. First, Madison's testimony was generally unreliable. For example, he first testified that at lunch on August 31 there was no union talk, but he later conceded that he was asked if he would sign a union petition. Second, Madison testified that he was there in the midst of his own "dispute" with Respondent and did not know whether his own job would continue. It is understandable that he would not sign a union card before settling his own job problem. His supervisory job was assured in a meeting with Korcz the next day. It is reasonable to assume that in that meeting Madison would impart his knowledge of employee activities to Korcz.

On Friday, Saturday and Sunday, Reinhardt, Styles and Vincent obtained about 27 signed cards (including their own), many of them in or near the store. Vincent delivered those cards to the Union on Sunday. Reinhardt had at least one card signed on Monday. The total number of cards introduced into evidence was 29. In addition to obtaining cards, the four alleged discriminatees spoke about the Union to several employees at work.

Reinhardt testified that, after work on Saturday, her husband informed her that assistant manager Alan Levy, a supervisor, had said that Korcz knew of the "big trouble" in the store and would be there on Sunday. Levy did not testify. As the General Counsel notes,

probative value may be given to hearsay which is admitted without objection. O'Malley Lumber Co., 234 NLRB 1171, 1175 (1978); N.L.R.B. v. Operating Engineers, Local 12 (Ledford Bros.), 413 F.2d 705 (C.A. 9, 1969). The prediction attributed to Levy proved accurate; although Korcz had been at the store for only a very short time on Saturday, he was there apparently all day Sunday and Monday, which was Labor Day. Hathorn had left town on Friday afternoon and did not return to the store until Tuesday morning.

Reinhardt and employee Fred Pumilio testified that on Saturday evening, September 1, assistant manager James R. Worden, a supervisor, spent an unusual amount of time in the home center

where Reinhardt and Vincent worked. Vincent testified that Worden also made frequent visits, for no apparent reason, to the stockroom while Vincent was working there. Worden maintained that he did not recall being in the home center except as he passed through en route to the automotive department, which he also manages; but then he added that he had been in the home center checking on lumber for his personal use. I credit the employee testimony.

In mid-afternoon of Labor Day, September 3, Reinhardt was called to the office where she was summarily discharged by Korcz. That evening, toward the end of his shift, Vincent was called to the office, where he too was summarily discharged by Korcz.

After receiving executed union cards from Vincent on Sunday, the Union sent Respondent a mailgram on Monday, claiming majority representation and requesting a card check. Hathorn received the mailgram apparently upon his return to work on September 4. That morning Korcz initiated a series of employee meetings. Later that day, Burkle and Styles were called into the office, separately, and summarily discharged by Hathorn.

In each of the four discharges, the employee's final check had already been prepared. None of the four was given any advance notice; nor was any of them given any opportunity to discuss the matter.

b. Discussion and conclusions

The evidence establishes that by Sunday, September 2, at the very latest, Korcz knew of the union activities at the store. Indeed, Korcz testified that on Sunday he had been informed by assistant manager Levy that there were union activities at the store.8/ And, as noted previously, Madison, who knew that Reinhardt and Vincent had obtained union cards and that Styles and Burkle had distributed them, settled his own problems with Korcz on

8/ The testimony was in essential conflict with Korcz' pretrial affidavit, in which he said that he first learned on September 4 or 5, when Hathorn telephoned about receipt of the Union's telegram. Korcz explained the discrepancy by saying that on Sunday Levy merely mentioned general union activities without naming any union.

Sunday.9/ Additionally, all four alleged discriminatees engaged in union activities at the store. While the store might not strictly qualify as a "small plant," it was operated in such a manner that the union activities would normally come to the attention of the employees and supervisory personnel. See, e.g., U.S. Soil Conditioning v. N.L.R.B., 606 F.2d 940, 948, 102 LRRM 2678, 2684 (C.A. 10, 1979).

It is significant that Korcz summarily discharged Reinhardt and Vincent on Labor Day while Hathorn was

---

9/ Bifora also know of the union activities. However, it is possible that, as he testified, he did not pass his information on to Hathorn or Korcz, since Bifora appears to have been sympathetic with the employees and may well have thought he had done enough by getting Reinhardt to prevent the proposed walkout.

out of town for the holiday weekend. There was no evidence of any urgency which might explain Korcz' taking such drastic action without consulting Hathorn, whose responsibility it was to keep the store staffed and operating properly.

Hathorn's discharge of Styles and Burkle is even more inexplicable on any legitimate grounds. He fired them the day he returned from his weekend vacation and there is no suggestion that he contemplated any such action before he left on Friday afternoon. Although he testified to the great importance he placed on trained security personnel, he gave no thought to replacements for Styles and Burkle for at least a week after their discharge.

Since the discharges here in issued came so rapidly upon the initiation of concerted and union organizational activities, there can be no substantial evidence of antiunion animus previously displayed at the Herkimer store. However, Korcz began his antiunion campaign immediately, calling employee meetings the morning of September 4, between the discharges of Reinhardt and Vincent and those of Burkle and Styles. As discussed below, the campaign was vigorous and included several violations of Section 8(a)(1).

Additionally, Respondent's long-standing antiunion animus is documented in numerous cases involving other stores. I take official notice of such prior reported cases, as follows:

S. E. Nichols Marcy Corp., 229 NLRB 75 (1977), enfd. by consent judgment (C.A. 2, No. 77-4154 1977); S. E. Nichols-Dover Co., 156 NLRB 1201 (1966), enfd. in relevant part,10/ 380 F.2d 438 (C.A. 2, 1967); Idem., 159 NLRB 1071 (1966), enfd. 374 F.2d 115 (C.A. 3, 1967); Idem., 165 NLRB 924 (1967); Idem., 167 NLRB 832 and 179 NLRB 249, enfd., 414 F.2d 561 and 73 LRRM 2816 (C.A. 3, 1967 and 1970), cert. denied, 397 U.S. 916, and 400 U.S. 831; S. E. Nichols of Ohio, Inc., 195 NLRB 939 (1972), enfd., 472 F.2d 1228 (C.A. 6, 1972); S. E. Nichols, Shillington Corp., 195 NLRB 189 (1972), enfd., 475 F.2d 1395

10/ In the first Dover case the Court affirmed the Board's finding of numerous violations of Section 8(a)(1) during a union campaign, but declined to enforce a Section 8(a)(5) bargaining order on the ground that the Union's majority status had not been established.

(C.A. 3, 1973), cert. denied, 414 U.S. 860 (1973). Respondent was later held in civil contempt of the Sixth Circuit's judgment in the Ohio case. N.L.R.B. v. S. E. Nichols of Ohio, Inc., 100 LRRM 2840 (N.D. Ohio, 1978), affd., 592 F.2d 326 (C.A. 6, 1979).11/

There is nothing in the present record to suggest that Respondent's view of unionism was changed an iota. Indeed, Korcz was found to have committed numerous unfair labor practices in the Marcy case, and in the District Court

---

11/ The General Counsel also cited the following unreported cases: N.L.R.B. v. S. E. Nichols Shillington Corp., C.A. 3 Civil Action No. 75-1751 (1975) (held in contempt); De Prospero v. S. E. Nichols Marcy Corp., N.D. N.Y. No. 76 CV 45 (1976) (Section 10(j) injunction granted); Eisenberg v. S. E. Nichols, Inc., D.N.J. Civil Action No. 78-2613 (1979)(Section 10(j) injunction granted).

trial of the Section 10(j) injunction proceeding concerning the Herkimer store he testified that Respondent was "using the same tactics" in Herkimer as it had in Marcy and he expressed his approval of those tactics.

With Respondent's antiunion animus and knowledge of the employees' union activities so clearly shown, the General Counsel has obviously established a strong prima facie case of unlawful discharges. The abrupt and unheralded discharge of all four union activists within 3 or 4 days after they initiated the organizing campaign is most persuasive evidence of Respondent's unlawful motivation. See, e.g., N.L.R.B. v. Elias Bros. Big Boy, Inc., 325 F.2d 360, 366 (C.A. 6, 1963); N.L.R.B. v.

Tru-Line Metal Products Co., 324 F.2d 614, 615-616 (C.A. 6, 1963) cert. denied, 377 U.S. 906 (1964).

2. Respondent's defense

a. General matters

To rebut the General Counsel's strong prima facie showing, Respondent sought to establish that all four alleged discriminatees were discharged for poor performance. Before analysis of each individual case, a few matters common to all should be noted.

Employee Margaret Goldsmith testified that on September 3, shortly after Reinhardt's discharge, she (Goldsmith) asked Madison if Reinhardt had been fired for union activities and Madison replied that "he couldn't say," but added that "there would be more to

go; it wasn't the end." Madison's apparent denial of this testimony was, at best, equivocal, and I credit Goldsmith. In context, Madison's statement could have meant nothing other than that other discharges for union activities would follow. Respondent argues that Madison had no way of knowing management's plans. However, as previously noted, Madison had been assured of his own supervisory position in a meeting with Korcz on the day before Reinhardt's discharge. Madison thus presumably spoke with knowledge of management's thinking and plans.

Goldsmith also testified that in employee meetings Korcz said that the alleged discriminatees "had been fired for not doing their jobs and not

cooperating with management" and "were passing out cards and he (Korcz) didn't want them harassing people in the store while they were working." Employee Linda Sheppard testified that in one employee meeting Korcz said that Styles had harassed employees and had threatened some in the lounge. According to Sheppard, Korcz defined harassment as "[t]rying to get people to sign union cards." Korcz did not specifically deny having informed employees that the discharges were, in part at least, related to the discriminatees' having "harassed" employees to support the Union. However, since Korcz and Hathorn denied having known of the individuals' union activities, Respondent cannot maintain that any such "harassment" led

to their discharge. And they presented no evidence of "harassment" by the dischargees. Additionally, since, as discussed below, Respondent did not have in effect any lawful rule restricting employee solicitation or distribution, and discriminately applied what rule it had, the discharges would clearly have violated the Act if they had been based on claimed violation of a rule against solicitation.

b. Dorothy C. Reinhardt

Reinhardt had been employed at the Herkimer store some 11 years. The record leaves no doubt that she was an exemplary, conscientious employee. She frequently and voluntarily worked substantial hours "off the clock"--coming to work before scheduled, leaving later

than her scheduled departure, cutting her luncheon break from 1 hour to as little as 15 minutes, etc. Reinhardt testified that she chatted with Korcz on August 17, when he visited the store to announce Genung's discharge. According to Reinhardt, Korcz said to her: "I haven't told you but I've told several other people, you're a very good worker, and keep up the good work and some day you will be an assistant manager," a position which she was seeking. Although Korcz denied having spoken to Reinhardt on August 17,12/ I credit Reinhardt. She was forthright throughout and displayed a clear and precise memory. On the other

12/ It would appear strange for Korcz not to speak with Reinhardt if, as he also testified, he noticed blatantly unsatisfactory conditions in her department at the time.

hand, Korcz' testimony was vague and usually lacking in details. Additionally, in some instances his testimony was inconsistent with his pretrial affidavit and with testimony of Hathorn.

There is no question that Reinhardt was well regarded. Bifora, her immediate supervisor, testified that she was a very good employee. She admittedly earned high incentive commissions. Abramczyk also apparently thought well of her. And Genung obviously had thought highly of her work.

Korcz testified that on August 17 and 18 he observed that Reinhardt's "paint department was not like it should be." Despite the claimed deficiencies, Korcz said nothing to Reinhardt. There

is no evidence that Hathorn observed or commented on any supposed deficiencies in Reinhardt's paint department on August 22, when he met her.

Respondent apparently maintains that the deficiency in Reinhardt's performance was reflected most strikingly in the presence of unopened cases of merchandise on the floor and/or in the aisles of her work area. A large portion of the merchandise she was in charge of is purchased from F. R. Schreiber Company. The general practice is that a Schreiber salesman comes to the store on a Wednesday to take orders and the merchandise is then delivered on the next Wednesday. It was on Wednesday, August 22, that Reinhardt worked during her vacation so she could give the Schreiber

order. Although delivery was due the next Wednesday, it did not arrive until the afternoon of Friday, August 31. It consisted of some 183 to 189 cartons, in two shipments. Reinhardt immediately set about emptying the cartons and packing the merchandise on the counters but was unable to complete the job by her scheduled departure at 6 p.m.13/ She had removed all the cartons from the floor of the department by the time she left work on Saturday, September 1.

At the hearing on Reinhardt's unemployment compensation claim,14/

13/ She credibly testified that she had intended to say on to finish the job that evening but left to accompany Vincent to meet with the union business agents because Styles had to work.

14/ All four alleged discriminatees applied for unemployment compensation and their claims were originally

Hathorn testified that it had taken Reinhardt from Wednesday to Friday or Saturday[15/] to take care of the Schreiber order, during which time there were cartons on the floor. When, in the trial in the present case, Respondent's records clearly established that the order had not arrived until Friday, Hathorn testified as follows concerning his prior testimony at the unemployment compensation hearing: "I had felt at

---

(footnote continued from previous page) denied on Respondent's contention that the employees had been fired for misconduct. However, after a hearing on review, an administrative law judge reversed, finding no employee misconduct and granting the claims. At the original trial in the present case, Respondent's counsel stated that an appeal from the grants of unemployment compensation was pending.

15/ Hathorn left on the Friday afternoon to spend the weekend in Ohio.

that time that Schreiber had come in on Wednesday. There was a previous shipment that came in the week before, it was also a Schreiber shipment. Whether it was eight or five [16/] or whatever departments they were, I'm not sure, but I do know that I saw merchandise on the floor and I had assumed it was the Schreiber shipment from the prior week." But Hathorn could not have assumed that any packages on the floor were from "last week's" Schreiber shipment, since such shipments were received only on alternative weeks. He did not mention any cartons on the floor before Wednesday, August 29. Additionally, according to his own testimony, he accused Reinhardt of "misconduct" without

---

16/ Reinhardt's department was No. 8.

even ascertaining in which department or departments he claimed to have seen cartons on the floor. Hathorn conceded that he made no attempt to have Reinhardt reinstated when he learned of his "error." It is thus clear that Hathorn was fabricating support for Reinhardt's discharge by Korcz.

In its brief, Respondent says that Korcz "noticed on two occasions as he walked through the paint department that Reinhardt was not there and that it was necessary to page someone to come to the department." The reference apparently is to Korcz' testimony that he was at the store on Saturday and Sunday, September 1 and 2, but "didn't see [Reinhardt] in her department." In

answer to a subsequent question, Korcz conceded that on one of those days Reinhardt was not scheduled to work.

In testifying and in a pretrial affidavit, Korcz indicated that he had not discussed Reinhardt's deficiencies with Hathorn before the discharge. Hathorn, however, testified that on August 29, 30, or 31, during his second week at the store, he had telephonically complained to Korcz about Reinhardt's work. In any event, it is undisputed that Korcz summarily discharged Reinhardt on Labor Day without consulting either Bifora, her immediate supervisor, or store manager Hathorn, who was due back at the store the next day. When she was called into the office on September 3, her final check had already been prepared

and Korcz initially simply announced her discharge. He apparently stated a reason only after she expressed her incredulity. Concerning the reason, Korcz testified:

> I told her that I was terminating her employment because she was not doing her job, I could not have two store managers running the store. I did not have her cooperation with the present store manager because I felt that she was favored by the last manager and I was terminating her employment for these reasons.

There is no evidence of how she was attempting to "run the store." As to the claim that she had been "favored" by Genung, Korcz testified that she "had excessive hours" under Genung, but then conceded that he did not compare her timecards for the periods before and after Genung's departure and that she had

been scheduled for 7 hours overtime in the week ending September 1. Reinhardt testified that Korcz terminated the discharge interview by saying that she was not working out well with the new management and that, if she wanted to discuss it further, she could call Respondent's president or vice president, in New York City for advice which indicates that the discharge was directed at the corporate level.

Respondent apparently recognizes the manifest anomaly of its summary discharge for poor job performance of a long-term employee with an indisputably established record and reputation for superior performance and devotion. To explain the claimed sudden deterioration in Reinhardt's work,

Respondent speculates that she had been much favored by Genung and intentionally lowered the quality of her work upon his unceremonious discharge. There is no question that, as Reinhardt freely testified, she was shocked and distressed by Genung's sudden discharge. But several facts belie Respondent's speculation concerning Reinhardt. Korcz testified that he observed deficiencies in Reinhardt's paint department on August 17, the very day he appeared unexpectedly at the store to announce Genung's termination. And shortly after Genung's discharge Reinhardt donated to Respondent a full day's work during her vacation, a fact hardly evidencing a vengeful attitude.

Perhaps most significant to Respondent's speculative argument concerning Reinhardt are the facts concerning her alleged vindictive motives. Respondent did establish that Reinhardt had been given somewhat more paid overtime work than the average in the store. However, there is no evidence that other employees resented this fact. On the contrary, the only pertinent evidence in the record shows that the employees liked Genung and were pleased with his management of the store. Without any contradiction, Reinhardt fully explained her relatively high overtime work. She had previously worked under Genung in the office. In that period she had spent considerable time, including many overtime hours, planning

and arranging for the installation of the home center. Upon the opening of the home center, she was transferred to it to operate its paint department. When Genung then tried other employees to assist in his office duties, he often found them unsatisfactory and thus called on Reinhardt. Finally, after his arrival, Hathorn changed the work schedules of many employees, increasing the hours of some and decreasing those of others, but he left unchanged Reinhardt's 45-hour a week schedule.

The evidence establishes beyond question that Reinhardt was not discharged for poor performance. Indeed, there is no evidence of poor performance which could even provide a pretext for discharge for cause. Particularly in

view of the roughly simultaneous discharge of the three other union activists and the nature of Respondent's subsequent antiunion campaign (discussed below), there can be no doubt that Reinhardt was discharged solely for her union activities.17/

c. Douglas Vincent

Vincent has started to work at the Herkimer store, in the automotive department, around March 1979. In the middle of August, at his own request, he transferred to the camera department, since he had experience in photography, which he viewed as his future career. Normally there are two employees covering

17/ In the District Court trial, Klimacek testified that Brecker at one point accused Reinhardt of fomenting the walkout planned for September 2. The fact is that Reinhardt prevented the walkout.

the camera, record and appliance departments in the evening. In addition to running the camera department, which, unlike other departments, is basically not self-service, he covered the nearby record department and assisted in the appliance department.

As previously set forth, Vincent engaged in considerable organizing activity at the store from Friday, August 31, until near the end of his shift on September 3, when he was called to the office and discharged by Korcz. According to Vincent, Korcz said that he had "been observing" Vincent that night and a "few" earlier times and Vincent did not seem to be doing [his] job; [he] seem[ed] to be sitting around a

great deal."[18/] As in the case of Reinhardt, and the two employees fired the next day, Vincent's final pay had already been prepared and was given to him on the spot.

Korcz testified that during the week of August 20, through 24, Hathorn's first week at the store and possibly Vincent's first week in the camera department, Korcz observed that "Vincent was consistently sitting in his department and then when he wasn't sitting there [Korcz] couldn't find him." Korcz added that he "felt there was definitely no coverage in that

---

18/ Vincent also testified that Korcz said, untruthfully, that there were no other departments to which Vincent could be transferred. It would seem strange for Korcz to mention the possibility to transfer if he believed that Vincent was a shirker.

department."19/ Vincent further testified that, any time he had been paged when away from the department, he had been at or en route to or from the office for a legitimate business reason, such as delivering large-denomination currency or getting change. Other evidence indicates that Vincent may have stopped to talk to other employees en route. However, such conduct appears to have been common in the store, and there was no rule against employees' conversing.

Vincent testified that on Sunday, September 2, Korcz visited the camera department and "took a look around

19/ Korcz did not state what Vincent was sitting on and there is no evidence that there were any chairs in the department. See discussion of Hathorn's testimony, below.

at the records and so on." Korcz observed that no music was being played and said he wanted the record player "playing the entire time the store was opened." According to Vincent, Korcz returned to the department the next day and asked Vincent to "straighten up and dust and so on" and Vincent complied. Korcz later visited again and "started looking through [Vincent's] salesbook and just general records within the department." There is no evidence that Korcz found anything amiss in the records. Vincent testified that "Mr. Korcz normally is not in the store giving instructions, usually it's the manager."

Hathorn testified that during his first 2 weeks at the store he once noticed Vincent "sitting [on] the back

showcase in the camera department." Vincent testified that it was impossible to sit on the counter, but added that he had used a glass-doored cabinet "as a leaning post." When in answer to Hathorn's inquiry, Vincent said he had no work to do at that time, Hathorn suggested that Vincent assemble some bicycles. According to Vincent, a stockboy then delivered two small, unassembled bicycles, which Vincent assembled. Thereafter Hathorn criticized Vincent for having worked too slowly and having assembled only two bicycles. Two 10-speed bicycles were then delivered to Vincent, who assembled them.

Hathorn also testified that once, during his first or second week in the store, he passed through the camera

department when "there were some customers at the counter and Mr. Vincent wasn't anywhere to be found." Hathorn then added that his had happened a "couple" of times that he could recall. He later testified that he spoke to Vincent "[j]ust that one instance when I asked him what he was doing on the showcase," which happened "[s]ometime the first week I was there." But then Hathorn added that during his second week he spoke to Vincent "when I saw him back in the sporting goods department." However, in a pretrial affidavit, Hathorn had said that "the only cautionary remark" he could recall having made to Vincent concerned the bicycle assembly.

Korcz testified that, at some unspecified time, he spoke about Vincent to assistant manager Charles Turner, Vincent's superior. He gave no details. Turner did not testify.

Korcz testified that, during the week of August 27 through 31, when he was visiting stores in Ohio, he received a telephone call from Hathorn, who reported "that he had a problem in the camera department, the he [Hathorn] could not get the man [Vincent] to do anything; that he was always sitting down, and [Hathorn] felt he was not getting the fullest from [Vincent] and [Vincent] was not performing his job." However, in a pretrial affidavit, Korcz had said that he had never spoken to Hathorn about any problems with Vincent before Hathorn left

on August 31 for the Labor Day weekend. Yet Hathorn testified that he believed he had never mentioned to Korcz any problems involving Vincent.

Even without its internal inconsistencies, Respondent's evidence is inadequate to establish that Vincent was discharged for cause. It is fair to infer that Vincent had been a satisfactory employee, since he had never previously been reprimanded; on March 25 Hathorn thanked him for having worked overtime to fill in for absent employees; and, after only 5 months' employment, he was given a transfer which he requested. Respondent does not offer even a speculative reason why Vincent might have lessened his industry immediately upon getting the job he wanted.

Perhaps most significant is the fact that Korcz, a district supervisor discharged Vincent at around 9:30 p.m. on Monday, with store manager Hathorn due back at work the next morning and Vincent presumably not scheduled to work before Tuesday evening. Thus, even if it had been shown that Vincent's work was deficient, the record would not support a finding that his discharge was dictated by such deficiency.

But, finally, the record does not establish any conduct by Vincent warranting discharge. In this connection, it bears repeating that assistant manager Turner, Vincent's immediate supervisor, did not testify and was not quoted as having expressed any dissatisfaction. It is undisputed that

Vincent was never warned of any possible discipline, let alone the supreme penalty of discharge.

Accordingly, I conclude that Respondent did not rebut the General counsel's prima facie showing and that Vincent was discharged for his union activities, in violation of Section 8(a)(3) and (1) of the Act.

d. Denise Styles and Kristin Burkle

Styles and Burkle were primarily security employees, although they were frequently assigned to other tasks. They worked the same hours, one of them stationed at the security desk at the front of the store while the other was at the rear of the store.20/ Their duties were to check packages brought

20/ They arranged between themselves to alternate posts.

into the store, to observe packages taken out, and with the assistance of closed-circuit television monitors, to watch for suspected shoplifting. The television cameras were located and operated in the front office, where there were also monitors used by management and office personnel.

Hathorn did not specifically testify as to when he decided to discharge these two employees. There is no evidence that he entertained any such action before he left for Ohio on Friday afternoon, August 31. He did testify that on September 4, he "again observed packages in the store, customers were bringing stuff into the store, the girls were not at their posts, [he] couldn't find them anywhere around the store and

general security just wasn't there." He provided no specifics. And, so far as appears, he did not speak to either of the employees at the time of his claimed observation and did not refer to any such specific incidents in the discharge interviews. Neither employee had ever before been disciplined or warned of possible discipline or discharge. Burkle testified, without contradiction, that on Friday, August 31, Hathorn had assured her "that he and Mr. Korcz were going over files and that [she] was going to get [her] raise in a couple of weeks," an unqualified assurance which would be most unlikely if he was dissatisfied with her work.

Burkle conceded that during Hathorn's first week at the store, he spoke to her about her having permitted a customer to enter the store carrying a Nichols' package. She replied that Genung, the former store manager, had said that it was all right to permit such conduct as long as the package was stapled closed and the receipt was readily visible. Hathorn then instructed her not to do so in the future. That was the end of the matter. Burkle testified further that, also during his first week at the store, Hathorn spoke to her about her not wearing the store-provided smock which employees were required to wear. It is clear that employees frequently are specifically instructed to don their

smocks, but there is no evidence that any employee has ever been disciplined when found without her smock.

Korcz testified that he had never observed any deficiencies in Burkle's work, nor had he discussed any such deficiencies with Hathorn. Hathorn also testified that on August 22, 2 days after his arrival, by viewing the television monitor, he observed that Burkle was not at her security desk. He spoke to her on the telephone and "mentioned, 'Don't you think you belong at your security desk' and she agreed." He then testified that on another occasion, also during his first week, he spoke to Burkle about "[b]asically the same thing I had mentioned to her, be at your post, stuff getting into the store,

please do your job." Burkle denied that Hathorn had ever spoken to her about being away from her work station. Based on the general unreliability of Hathorn's testimony, the precision of Burkle's testimony, and careful observation of the demeanor of the witnesses, I credit Burkle.21/ Korcz testified that:

21/ In its brief, Respondent says: "Burkle admitted that when she left her position she usually didn't get someone to watch it while she was gone." In support of this statement, Respondent cites a portion of Burkle's cross-examination, which reads, in pertinent part:

> Q. Did [Mr. Genung] give you any instructions about what to do when you left the security booth, were you to get somebody to take your place?
>
> A. If it was an emergency situation or [you] were called to another part of the store by another employees and didn't have time to look for someone to relieve us. During breaks and lunch we had to have a re-

On the day after Labor Day [Hathorn] had mentioned that he had a problem with Denise [Styles] and Kristin Burkle and he felt that the problem was serious

---

(footnote continued from previous page)
lief.

* * *

Q. When you left the security booth did you always get someone to take the position?

A. Yes.

* * *

Q. Were you asked [at the unemployment compensation hearing], did you get someone to watch it while you left and did you answer, not usually?

A. We were asked by other employees to get change and do a price check. Usually the employee who asked us would keep an eye on the security booth while we were gone.

Q. I want to ask you whether or not you were asked that question and gave that answer at the unemployment compensation hearing, "Did you get someone to watch it while you were gone? "answer, "not usually?"

> enough that he was going to be taking action on it. I explained my viewpoints.

Korcz did not reveal the "viewpoints" he imparted to Hathorn and Hathorn did not corroborate Korcz' testimony that the two men had discussed the matter before the discharges. Korcz testified that he had not observed any deficiencies or problems in Burkle's work before her discharges and he did not retreat from the statement in his pretrial affidavit that he had not discussed any work problems of Burkle or Styles with Hathorn before the latter's departure on Friday, August 31. In view of Hathorn's and Korcz' testimony, it is impossible even to speculate on what

---

(footnote continued from previous page)

> A. Yes.
>
> I do not read the colloquy as an "admission" of any wrongdoing by Burkle.

basis Korcz might have believed that the two employees should be discharged. Yet it is inconceivable that Hathorn would have fired them against Korcz' advice; Hathorn had been at the store for less than 3 weeks, while Korcz had supervised it for many years and, according to his testimony, had visited each store at least once a month.

Respondent's case against Styles is no better or clearer than that against Burkle. Styles had commenced working at the store in April 1977 and had spent about 75 percent of her time in security for some 6 months before her discharge. She testified that she had never been disciplined and had never been criticized for her security operations. She said that she had been criticized

only twice, and then not for security operations: once, while Genung was still manager, Korcz told her "[t]o stop eating potato chips at [her] booth," and once Hathorn directed her to don her smock, which she had eliminated because of the heat caused by the breakdown of the store's airconditioning. Respondent adduced no evidence of any written warnings or other discipline ever given to Styles.

Korcz' testimony concerning his observation of Styles after August 20 was characteristically devoid of specifics, as follows:

> I noticed that security was not being handled properly. On several occasions upon leaving the store I had to have my bags checked and I had to summon her to check it.[22/] On several

22/ An unexplained lease majeste.

> occasions she was munching at the security desk. I personally told her to straighten up and look like a store security personnel.

Respondent apparently does not contend that Styles was fired for not "look[ing] like a store security personnel," a condition never described.

In its brief, Respondent says: "It is also clear from her own testimony that Styles was likewise inattentive to her duties" Respondent adds two record references: the first to Styles' testimony that after lunch on August 31, she telephoned 12 to 15 employees about walking out the next day; the second to her testimony that on September 1, while she was running a cash register, she telephonically solicited employees to sign union cards. There is no evidence

that employees were forbidden to use the store intercom telephone for personal conversations or that Styles' calls delayed or interfered with work. And Hathorn did not mention this incident when he ischarged Styles. Indeed, Respondent could not make any such contention while it maintained that it did not know of Styles' involvement in a proposed walkout or in any union activities.23/

On the foregoing considerations, I find that Respondent has failed to establish that either Burkle or Styles

23/ However, it appears that, at the unemployment compensation hearing, Respondent's counsel did argue that Styles' "allowing herself to be diverted from her activities" by these telephone calls was at least part of the cause for her discharge, which would make her ineligible for unemployment compensation.

was discharged for cause. The credited evidence as a whole compels the conclusion that they were terminated solely for their union and/or other concerted activities.

B. Section 8(a)(1)

1. General Comments

The complaint, as amended, alleges several independent violations of Section 8(a)(1), which will be discussed individually. But certain general observations should be made initially.

Most of the alleged Section 8(a)(1) violations occurred during a series of employee meetings conducted by Korcz on and after September 4. Thus, the conduct in question occurred in the shadow of the blatantly unlawful discharge of all the union activists,

after the employees' anxieties had already been aroused by the precipitous discharge of Genung.

It has previously been found that the testimony of Korcz and Hathorn was unreliable. An additional consideration arises concerning the employee meetings. Undisputed testimony by employees called by the General Counsel establishes that Respondent had all the employee meetings taped and/or stenographically recorded.24/ Yet Respondent did not offer in evidence any transcripts and did not explain its failure to do so. Since there is frequent conflict concerning what was actually said at some of the

24/ In the later District Court trial Brecker, Respondent's president, testified that all employee meetings were taped.

meetings and the context in which statements were made, verbatim transcripts would be of inestimable value. Accordingly, I infer that the transcripts would not support Respondent's position and resolve against Respondent's witnesses all conflicts of evidence concerning the statements made by Respondent's representatives at employee meetings. Taylor Bros., Inc., 230 NLRB 861 (1977).

2. Specific allegations

a. 25/ Threat of discharges

As set forth above, employee Goldsmith credibly testified that, when she asked Madison, an admitted supervisor, if Reinhardt had been fired for

25/ The letter designations in this section are taken from the relevant section of the complaint.

union activities, he replied that "he couldn't say," adding that "there would be more to go, it wasn't the end." In context, Madison's statement could not be understood other than as a threat of further discriminatory discharges.

In its brief, Respondent says: "Since Madison testified that he had no conversations with Korcz concerning union activity . . . , he obviously could not have made the alleged statements to Goldsmith." That argument is an obvious non sequitur, even if Madison's testimony is accepted as true. Madison was aware of what had transpired and thus was in a position to draw inferences without confirmation by Korcz. Even if he was actually stating his own inference (or even

conjecture), his statement would be attributed to Respondent, since he was an admitted supervisor.

Accordingly, I find that, as alleged, Respondent violated Section 8(a)(1) by Madison's statement to Goldsmith on September 3, shortly after Reinhardt's discharge.

b. Solicitation of complaints with promises of rectification

Employee Fred Pumilio testified that, in a meeting of about 10 employees on the morning of September 4, Korcz said that Hathorn's new schedules, a source of employee complaints, would not be put into effect. Pumilio also testified that, at one of the meetings, Korcz solicited employee suggestions for improvements.

One employee recommended installation of a suggestion box, which was promptly effectuated.

Employee Robert Price testified that, when Korcz solicited complaints at one meeting, employee Diana Buono said that she had unsuccessfully asked assistant manager Levy about a raise due her, whereupon Korcz said "he would take care of it."

Goldsmith testified that at an employee meeting, in response to Korcz' asking if there were any problems, one employee said she needed a clock and lights. Within a few days the clock was provided. Goldsmith did not know if a light was installed.

Employee Klimacek testified that, at one meeting, an employee said she had not received jury-duty pay and Korcz said that he would remedy the matter, which he did. Klimacek also testified that she asked about a raise and Korcz replied that he and Hathorn were reviewing the payroll. She also asked about Blue Cross-Blue Shield coverage and Korcz said that Respondent "did not sell insurance but there was a benefit [the employees] could have by paying a computer fee." Respondent's employee handbook lists life insurance and hospitalization as existing benefits. None of the foregoing testimony was contradicted.

Respondent contends that the Korcz' statements were merely restatements of Respondent's established "open-door policy." Korcz testified:

> I don't solicit employees' complaints or grievances; the company has always tried to have an open-door attitude towards our employees; if they had a question or problem pertaining to store policy--whether it be pay raise, whether it be life insurance, whether it be time off--if it's about a complaint I will take care of it because it was my job to make sure that company policy and rules were being followed.

The evidence is undisputed that before the union campaign began no meetings had ever been held in which employees were encouraged to ask questions or state their complaints. Neither Korcz nor any other representative of Respondent stated when or how employees were invited to

discuss their problems with management. It may so be noted that Korcz testified that a major reason for Genung's discharge was his failure to carry out company policies, including the grant of automatic raises at the end of an employee's first 6 months. Since Korcz testified that he visits each store under his supervision at least once a month, it appears that the claimed "open-door" policy was not so widely known as to assure employees the benefits supposedly due them.

The employee handbook is revealing. The following is a portion of the section of the handbook entitled "YOUR EMPLOYEE RIGHTS UNDER A UNION ORGANIZATION DRIVE." In this quotation,

the portions underscored were deleted and the sentence in brackets was added in 1980.

> Your company's automatic pay increases, vacation plan, sick leave benefits and promotional advantages are the best in your community. There are discussed on previous pages of this booklet given to you when you are hired. Do not be deceived. Any problems which you wish to discuss and to which you have not received a satisfactory answer, write to:
>
> ATTENTION: PERSONNEL DIRECTOR
> [New York City]
>
> You will receive a satisfactory answer to the best of our ability. Remember, you are the first and the last link between Nichols and our customers. If you are not happy, our customers will know it, and this can hurt us. [Our goal is to make you happy.]
>
> In closing, remember to stay out of problems, the only paper to sign is your pay receipt, which will get bigger the longer you work at your job doing the best you know how.

While the section concerning unions ended the earlier handbook, in the 1980 revision some further material was appended, concluding:

> Our company encourages good communications. We invite you to talk with any member of the management team whenever you feel the need to do so.
>
> Sincerely,
> Store Manager

It thus appears that the employee handbook originally referred to communication to employees only with the personnel director, at the corporate office in New York City, and only during a union organizing campaign. The manifest purpose of such communication was to give Respondent an opportunity to keep the employees from being "deceived" into supporting a union and signing union

cards. It was only belatedly that Respondent invited employees "to talk with any member of the management team whenever [they felt] the need to do so." At the same time Respondent added the company's "goal . . . to make [the employees] happy." Thus, when an "open-door" policy was suggested, the message still was that the employees did not need a union because Respondent would make them happy without one.

On all the evidence, I find that, as alleged, Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances and complaints and promising to remedy them, for the purpose of dissuading employees from supporting a union.

c. Promises of wage increases

As set forth in the preceding section, employees credibly testified that Korcz told employee Buono that he "would take care of" the raise she said she had unsuccessfully sought through Levy. Goldsmith testified that Korcz said Genung did not "go over raises periodically" as he should have, and added that "after this thing blew over, [Korcz] would have the new manager go over our raises and give us periodic raises." And Klimacek testified that Korcz said that Hathorn "was reviewing the payroll." Pumilio testified that Korcz "said he couldn't promise any [raises] at the time, [because] that would be bribery," but "he would go over raises with Mr. Hathorn in the future."

As noted below, Korcz made it clear that there was no assurance of raises if the Union became the employees' bargaining representative. Thus, there can be no doubt that Korcz clearly implied that raises would be forthcoming if the employees rejected the Union.

Respondent contends that Korcz was simply promising to effectuate the Company's established policy of granting each employee a wage increase at the end of his first 6 months. According to Korcz, he was called up to do so because Genung had failed to execute that policy. But Korcz had been Genung's supervisor and, as such, visited the store at least on a monthly basis. Thus, if it were true that Genung had ignored the "policy," it follows that it was not

uniformly applied. Indeed, the employee handbook provides for a 10-cent per hour raise after an employee's first 6 months, but "[t]hereafter, increases will be made at the discretion of the manager."26/ Korcz' promise to "review" wages during the union campaign were not shown to conform to any established pattern. The same is true of the raises actually given shortly before the election.

I conclude that, as alleged, Respondent, through Korcz, promised wage increases to dissuade employees from supporting the Union, in violation of Section 8(a)(1) of the Act.

26/ The manual also says: "Nichols has a system of automatic pay increases which go into effect from the day you start working. This system saves you the trouble of asking for pay raises." (Emphasis supplied.)

d. Solicitation of employees to withdraw union authorization cards

There is considerable uncontradicted, and credited, employee testimony that on several occasions, always on his own initiative, Korcz told employees that they could recall or withdraw union cards which they might have executed. Korcz testified that he told the employees they could talk to him about such retractions. He offered to give employees an address to which to send retractions. Respondent's employee handbook contains specific instructions in this connection[27] and Korcz discussed

---

27/ This handbook provision is:

> If you have signed a Union Card and you change your mind and you wish to withdraw your card for any reason you decide, YOU CAN DO SO AT ANY TIME.

the matter in virtually all his numerous meetings. Additionally, Klimacek testified without contradiction, that employee Chet Cornaccio gave her, at the store, a prepared form for retraction addressed to the president of Local 345.[28] Respondent argues:

(footnote continued from previous page)

> Write to the President of the Local to whom you have given your signature and simply say you no longer want your card to be used, and keep a copy.

Goldsmith testified that in the employee meetings Korcz orally advised employees to "make sure you have a copy [of your retraction] and give it to a friend so someone else knows that you have retracted your card."

[28] Cornaccio had been recently employed part time at the Herkimer store. His functions do not appear and the testimony was that he spent his time going through the store and spent considerable time talking and drinking coffee with management personnel, who frequently summoned him.

> It is not a violation of the Act for an employer to suggest that it is possible for employees to withdraw their union authorization cards. N.L.R.B. v. Monroe Tube Company, 545 F.2d 1320, 1325 (2nd Cir. 1976). That is all that occurred here and therefore there was no violation of the Act.

In Monroe Tube, the court held only that solicitation of employees to withdraw their union cards was not per se violative of the Act. As the court said in Monroe Tube, cited by Respondent:

> ...While it is certainly true that an employer's solicitation of withdrawal letters may violate the Act under some circumstances, the propriety of such conduct must be assessed in the light of all the facts in the case, particularly the employer's prior and contemporaneous conduct in dealing with union activities. [545 F.2d at 1325]

(footnote continued from previous page)

Unlike Monroe Tube, the present case involves much more than a suggestion that employees have a right to retract their union cards. The frequency of Korcz' repetitions of the unsolicited advice surrounds it with an aura of inordinate importance which would naturally tend to cause employees to fear future adverse action if not heeded. Additionally, the portion of the handbook in which the information is contained has a general, overall coercive tone and effect. Cf. S. E. Nichols of Ohio, Inc., supra, 195 NLRB at 941, 943. Most significantly, this repetitious "advice" was given after the four instigators of the union campaign had been fired and Korcz attributed the discharge in substantial part to their having

solicited union cards. And, finally, the "advice" was an integral part of what is here found to be an overall pattern of coercive misconduct.

It may be conceded that Korcz did not in haec verba "ask" employees to withdraw or retract their authorization cards, but, against the backdrop of Respondent's animus and other coercive conduct, his repeatedly volunteering the suggestion and the emphasis thereon in the employee manual would clearly suggest to employees that they would be well advised to withdraw their cards to avoid the fate of their four discharged colleagues. The eschewal of a direct "request" amounts to unsuccessful "brinkmanship." Cf. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 620 (1969),

quoting Wausau Steel Corp., v. N.L.R.B., 377 F.2d 369, 372 (C.A. 7, 1967).29/ Within the court's language in Monroe Tube, Respondent's "contemporaneous conduct in dealing with union activities" is described in this Decision; its "prior" conduct is graphically revealed in other Board and court decisions, cited above. It was largely on the basis of

---

29/ In Trojan Battery Co., 207 NLRB 425 (1973), it was held that, in context, "advice" amounted to "admonition," violative of the Act. In Airporter Inn Hotel, 215 NLRB 824, 826 (1974), overruling Trojan Battery pro tanto, a Board majority rejected the view that "all admonitions are unprotected by Section 8(c)." But it was recognized that decision must be made in the light of the context. It may further be noted that two of the three-member majority in Airporter Inn (Chairman Miller and Member Kennedy) are no longer on the Board, whereas present Chairman Fanning and Member Jenkins dissented in Airporter, citing Trojan Battery. (215 NLRB at 827, n. 10).

the absence of prior or contemporaneous misconduct that the Second Circuit distinguished Monroe Tube from numerous other cases in which courts have sustained Board findings of Section 8(a)(1) violations consisting of soliciting employees to recall their union authorization cards.

It may be added, although this is not necessary to the present decision (N.L.R.B. v. Monroe Tube Co., supra, 545 F.2d at 1327), that several employees did in fact withdraw their union authorization cards.

Accordingly, I find that, as alleged, Respondent violated Section 8(a)(1) of the Act by soliciting employees to withdraw their union authorization cards.

e. Threat of loss of benefits

Considerable employee testimony establishes that, in one form or another, Korcz repeatedly expressed variations on the theme that if the Union became the employees' representative "bargaining would start from scratch" and existing benefits, which Respondent described as "the best in the area" could be lost. In considering Korcz' conduct, it is perhaps best to start with his own testimony as to what he said. On direct examination, he testified:

> Q. . . . Did you inform employees that in the event the Nichols employees selected the union, all existing benefits would be removed?
>
> A. No, I did not. I informed the employees that if a union would be established, their rights would go back to where they would have to go back to step I.

Q. They would have to bargain?

A. They would have to bargain. I did not tell them they would lose everything since I had no knowledge of what they would lose or what they would not. [Emphasis supplied.]

He repeated the same thought on redirect examination:

A. The employees had mentioned the fact that what if we have a union and what benefits do you have and I said, I don't know what benefits you have, you'd have to start at Step I. You have to go back and negotiate for what you want.

Q. What do you mean by Step 1?

A. They would have to negotiate for wages, they would have to negotiate for life insurance and benefits that would either remain the same or improve or be deleted.

It will be noted that Korcz' basic thought was "going back to Step I," the concept of bargaining being injected first by a leading question by

Respondent's counsel. And even with the help of counsel, Korcz never indicated that he had suggested the "horse-trading" or "give-and-take" nature of bargaining.

Goldsmith attributed to Brecker the more common terminology that they would "have to start all over if they got a union in, [they] would start from scratch." According to Goldsmith, Korcz warned: "[y]ou don't know what you are going to end up with, you might not do so well. Employee Sheppard quoted as saying "[t]hey would wipe the booklet clean and have to start all over again."

The Board has recently clearly restated the governing principles in Taylor-Dunn Manufacturing Company, 252 NLRB No. 118, slip op. pp. 7-8 (1980), as follows:

It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat or loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

* * *

In our view, [the respondent's representative's] remarks clearly conveyed to employees a threat of loss of existing benefits. In this regard, [his] statements were unaccompanied by any assurances that such losses, if any, would be the result of the normal give and take of collective-bargaining and not of employer retaliation. In addition, these comments were made in the context of a preelection campaign replete with numerous unfair labor practices committed by Respondent, including its

> declarations of an anticipatory refusal to bargain with the Union. Therefore, we find that [his] statements violated Section 8(a)(1) of the Act, and that issuance of a remedial order for this violation is fully warranted.

The present case, falls within the holding in Taylor-Dunn. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by threatening loss of benefits if the employees chose to be represented by the Union.

f. Threat of company knowledge of union cards

Employee Pumilio testified at two employee meetings Korcz "said that his lawyer can receive the union cards." Despite Korcz' conclusory denial of having told the employees that

Respondent's attorney would be informed of all employees who signed cards, I credit Pumilio.

Korcz' statement, as reported by Pumilio, might reasonably place employees in fear that their signing union cards might well become known to Respondent. In view of the known fate of Reinhardt, Vincent, Styles and Burkle, even the least timid employee might well refrain from signing a union card out of fear of possible disclosure. As the General Counsel observes, such conduct by Respondent is not unprecedented. See e.g., S.E. Nichols Marcy Corp., supra, 229 NLRB at 79, 80, where a Nichols district manager informed an employee that Respondent was "going to subpoena the cards," and it was found that

Respondent had violated Section 8(a)(1) by, inter alia, "warning employees that the Company would find out from the Board who had signed cards."

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by indicating to employees that their signing union cards might become known to Respondent.

g. Threat to discharge discriminatees if reinstated

Employee Goldsmith testified that at one employee meeting, Korcz was asked if the four discriminatees would be reinstated, to which he answered: "[Y]es, but once they're reinstated, they don't last too long"; in other words, pretexts

would be found for their later discharge. I credit Goldsmith, despite a blanket, conclusory denial by Korcz.30/

It is concluded that Respondent violated Section 8(a)(1) of the Act by threatening to discriminate against any employee whom the Board might order reinstated.

30/ As the General Counsel observes, such conduct is in line with Respondent's past course. See N.L.R.B. v. Nichols of Ohio, Inc., supra, 100 LRRM 2840, where Respondent was held in contempt for failure to comply with a reinstatement order.

h, i, and l. 31/ Distribution and solicitation

Respondent's employee handbook, as in effect during the period here involved, until January or February 1980, contained the following provisions:

> An employee shall not solicit or distribute literature to other employees for any cause or purpose during the working time inside Company buildings or on Company property. [Emphasis supplied].

In Essex International, Inc., 211 NLRB 749 (1974), the Board held that a rule prohibiting employee solicitation during "working time" is presumptively valid because "the term 'working time' or 'work

31/ These letters conform to the subparagraphs of Part V of the complaint in Case No. 3-CA-9304. However, the complaint in Case No. 3-CA-9714 contains a related allegation and evidence from the District Court record is included in this Decision.

time' connotes the period of time that is spent in the performance of actual job duties," as distinguished from "working hours," which "connotes the period of time from the beginning to the end of a workshift." Without nitpicking, in the present context a distinction may well be drawn between "working time" and "the working time"; "working time" would reasonably be understood as referring to the time which the particular employees involved were working, whereas "the working time" could reasonably be understood as more general, meaning "the working time in the plant." Had Respondent meant to limit the prohibition to the time during which an employee was

working, it could have said just "working time." Thus, use of the phrase "the working time" creates an ambiguity.

In any event, the revised version, using the phrase "working hours," is presumptively invalid under Essex International. While it is possible that the earlier rule was adopted before the Board spelled out the presumptions, the revision came some 4 1/2 years after the Essex decision. Respondent has not explained the change in wording. In view of Respondent's extensive involvement with Board law, the change appears to have been made in advertent defiance of applicable Board law.32/

32/ Respondent does not argue that the Essex rule is improper or invalid; it argues only that its written rule is not the rule actually in effect.

In order to rebut the presumptive invalidity of the rule under Essex International, Respondent had the burden of removing the ambiguity. Cf. Our-Way, Inc., 238 No. 27. J.D. slip op. p. 14 (1978). It could meet this burden by extrinsic evidence establishing that "the working hours rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." Essex International, supra, 211 NLRB at 750. To meet this burden Respondent relies primarily on the testimony of Goldsmith and Korcz. On cross-examination, Goldsmith's testimony was:

> Q. Did Mr. Korcz say anything about how the employees in the store could solicit for a union if they wanted to?

A. He said the only way we could was off-store premises or when we were punched out on lunchtime but not on company time.

Q. He told you it was all right to solicit for a union but not on company time?

A. Right.

Korcz did not testify that he ever had informed the employees that the rule in effect was different from that appearing in the handbook, as Respondent's counsel expressly stated before Judge McCurn. The publication of the 1980 revision belies any such contention. And in testifying Korcz failed to "clarify" the rule so as to render it valid. He testified that, in employee meetings on September 5, he told employees not to hand out union cards on working hours. In later meetings he "told them there

should be no solicitation of union cards on the company property, to do it on your own time." He proceeded:

> Q. Did you tell them they couldn't do it at all on the store premises?
>
> A. I told them to do it on their own time.
>
> Q. Did you tell them they could not do it in the lounge when they were on breaks?
>
> A. I didn't tell them that; I said if you want to do it, do it on your own time in the lounge or whatever.

Nor did the employees have any clear understanding of the rule. Before Judge McCurn, employee Rose Ceneviva, called by Respondent, testified:

> Q. [By Respondent's counsel] Is there a rule about distributing literature in the store?

A. On store time, there is.

* * *

THE COURT: . . . Is there a rule about . . . distributing literature on the premises?

THE WITNESS: Yes, you shouldn't be doing anything.

THE COURT: Now, is there such a rule, is there a company rule about distributing literature on the premises of Nichols Department Store which employees are made acquainted with?

THE WITNESS: I can't remember.

It is clear that the rule, as interpreted by Respondent is invalid. The evidence establishes that employees are entitled to a 10-minute breach during each 4 hours.33/ Such breaks are nonworking time but are paid for. Yet in

33/ This privilege was written into the 1980 revision of the employee handbook, but apparently existed before then.

its brief Respondent says: "It is clear from the testimony of district supervisor Korcz and employee Margaret Goldsmith that solicitation is permitted in nonwork areas . . . and while the employee is clocked out on a break." There is no evidence that employees "clock out" for their breaks.

The ambiguity goes not only to the temporal restriction, but also to the spatial limitation. As indicated above, at least Ceneviva claimed to understand that employees were not to do any distribution on company premises. In its brief, Respondent apparently attempts to equate "inside Company buildings" and "inside Company buildings or on Company property" with "non-work areas," saying: "The enforcement of this rule to limit

union solicitation on non-work areas in proper." Respondent cites Montgomery Ward & Co., 145 NLRB 846 (1964), enfd. in pertinent part, 339 F.2d 889 (C.A. 6, 1965). But that case permits total prohibition of employee solicitation in public portions of retail stores; a "ban [of] all union solicitation on company property" was held unlawful.

On the foregoing considerations, I find that, as alleged, Respondent's no-soliciation and no-distribution rule, both before and after its revision early in 1980, violates Section 8(a)(1) of the Act.

It is also alleged that the rule was discriminatorily applied against union solicitation. It was apparently discussed only at employee meetings

called in connection with the union campaign and, so far as appears, the discussion concerned only union solicitation and distribution.

At various times Respondent's representative maintained that Reinhardt, Vincent, Styles and Burkle had been discharged in part for union solicitation in violation of the rule. Pumilio was given a written warning for "distributing union handbooks on Company time and using the Company equipment to store such matter." Employees Reinhardt, Pumilio, Sheppard, Goldsmith, Klimacek, Styles and Burkle testified to frequent solicitations by employees at the store during working hours. They ran the gamut from charitable fundraising, through collections for gifts to employees and

management representatives on various occasions, sales of Avon products, Tupperware, Sarah Coventry jewelry, etc., to baseball pools. Without expressly so stating, Korcz sought to create the impression that all such solicitations were to be conducted on luncheon breaks and in nonwork areas. However, he did not so state.34/ Yet there is no

---

34/ On direct examination he testified:

> A. If an employee wanted to collect for something within the store, meaning a funeral or a fire, March of Dimes or something worthwhile and it was done in a low-keyed manner such as in the lounge and it was not blown out of proportion, we accepted it.
>
> Q. What about these Tupperware, Avon sales and promotions of that kind, what was the procedure that was supposed to be followed in the Company concerning that?
>
> A. The procedure that was to be

evidence--not even conclusory testimony --that any employee had ever been reprimanded for, or told to cease, soliciting or distributing for nonunion purposes.

For the foregoing reasons, I find that, as alleged, Respondent discriminatorily applied and enforced a restriction on union solicitation and distribution.

The employee handbook originally also contained the following provision:

(footnote continued from previous page) followed at that point, if an individual was on their lunch hour and there was book there for Tupperware or Avon or anything else and the individual wanted to select something from that book and they were on their lunch break, they could do so.

> Employees shall not accept any literature distributed, for any purpose, by persons not employed by the Company inside Company buildings or on Company property.

In the 1980 revision, the words "during working hours" were added at the end of the sentence. The vestibule of the store was also posted against any solicitation. The General Counsel maintains that the quoted rule violates the Act.

Since an employer may legitimately prohibit all solicitation and distribution by nonemployees on his premises it appears reasonable that he may also forbid employees to abet such proscribed conduct by accepting material from outsiders on his property. I read the rule under consideration as forbidding employees only from receiving literature on company premises only

directly from outsiders, i.e., as not prohibiting accepting literature from other employees merely because it may have originated with nonemployees. So read, the rule is permissible. McGraw Edison Co., 216 NLRB 460, 464 (1975) enfd. in pertinent part 533 F.2d 1266 (D.C. Cir. 1976) cited by the General Counsel, is not to the contrary, since the rule there invalidated, on its face forbade all sales and solicitations.

j. Request for employee reports of union activities

Respondent's employee handbook, in both the original and the revised versions, says:

> Remember, do not sign a card because you are threatened, tell us and we will protect you. It is your right to have a union. It is your right not to have a union. Our Company will try to see to it that your rights are preserved no

> matter how you choose. Tell us if someone is trying to stop you freedom of choice.

At employee meetings Korcz repeatedly advised employees to report "harrassment," "threats" or "trouble" to management, whose counsel would "help [the employees] out as far as the union harassing" them. Klimacek also testified that Korcz said that if the employees "had any problems, [they] could go to him, or Mr. Hathorn." Korcz also told the employees that "if they felt they were threatened, if they felt they had problems, and they did not have an attorney or they couldn't afford an attorney, that they could see [Respondent's] attorney." Korcz said that two employees "wanted to see an attorney." However, he then conceded

that he had first broached the subject and offered the services of Respondent's counsel. He added: "The only thing that employees said that led to the fact if they needed an attorney was the fact that one girl had mentioned that date she went out and her tire was slashed and she was concerned." The employee purportedly quoted did not testify. There is no evidence that the Union was in any way involved or that Respondent made any investigation or attempt to "protect the employee."

Since Korcz equated "harassment" with solicitation of union support and "freedom of choice" with the absence of union solicitation, it is clear that he was inviting employees to report any union solicitation to

Respondent's management and its counsel. The Board had previously condemned such conduct and the corresponding portions of Respondent's employee handbook. S. E. Nichols of Ohio, Inc., supra, 195 NLRB at 942-943. On that authority, I find that, as here alleged, Respondent violated Section 8(a)(1) of the Act by soliciting employees to report on union activities at the Herkimer store.

k. Instructing employees not to sign union cards

The General Counsel contends that Respondent's employee handbook unlawfully instructs employees not to sign union cards. It contains the following statements:

> Do not sign a card because you are told that if you sign now, you will not have to pay initiation fees, and that non-signers will be

> forced to pay such fees if the Union gets certified. [Emphasis in the original.]
>
> * * *
>
> Remember, do not sign a card because you are threatened, tell us and we will protect you. It is your right to have a union. It is your right not to have a union. Our Company will try to see to it that your rights are preserved no matter how you choose. Tell us if someone is trying to stop your freedom of choice. [Emphasis in the original.]

Respondent's underscoring only the words "Do not sign a card" in the first paragraph quoted above makes that admonition stand out, relegating the qualification to relative insignificance. However, despite that deceptive emphasis, those statements by themselves would fall within the permissible limits set in Airporter Inn Hotel, supra, 215 NLRB 824, cited by the General Counsel.

But the quoted statements do not stand by themselves. In the pre-1980 revision, which was in effect during a large part of the pre-election campaign, there is further flat advice: "In closing, remember to stay out of problems, the only paper to sign is your pay receipt, which will get bigger the longer you work at your job doing the best you know how." Against the background of the four discriminatory discharges, employees would reasonably infer that their job futures depended on their not signing union cards. This message is underscored by the further message, at the beginning of the section on unionization, telling the employees of "one more benefit your company gives you," namely, protection from "being

exploited or taken advantage of by outsiders," most notably "Union Organizers." As previously noted, the Board has previously adopted an Administrative Law Judge's decision giving weight to such handbook provisions in appraising Respondent's conduct. S. E. Nichols of Ohio, Inc., supra, 195 NLRB 939.

Again, Respondent has failed in its brinkmanship. I find that, as alleged, Respondent has violated Section 8(a)(1) of the Act by coercively discouraging its employees from signing union cards.

m. Offer to provide counsel in employee interviews with Board agents

Goldsmith testified that Korcz told employees that Board agents would visit the store the next week and might want to interview them. He then said that "if [they] needed any protection he would get his lawyer to sit in on the meeting." After considerable fencing and equivocation, Korcz conceded that, on his own initiative, he told employees they could see Respondent's attorney if they needed help in connection with anticipated requests by Board agents for employee statements.

As the General Counsel argues, Florida Steel Corporation, 233 NLRB 491, 494 (1977), is authority for finding Korcz' conduct violative of the Act. In

Garry Manufacturing Co., 242 NLRB No. 94 (1979), the Board reaffirmed its Florida Steel view. I am bound by the Board's decisions, even though, as to the point under consideration, both were reversed by Court of Appeals:35/ Florida Steel by the Fifth Circuit, 587 F.2d 735 (1979); Garry Manufacturing by the Third Circuit, F.2d , 105 LRRM 2113, 2120-2121 (1980). While the Board has well articulated the statutory and policy considerations underlying its rulings, the very recent reversal by the Third Circuit suggests the advisability of some further explication.

35/ Hotel and Restaurant etc. Union, Local 28 (Johnson), 252 NLRB No. 158 (1980), slip. op. p. 2 and JD slip op. p. 21.

In Florida Steel,, the court stated that "The Board concedes that employees do have a right to obtain legal counsel, if they so desire, prior to talking to an agent of the Board."36/ However, at the time both Florida Steel and Garry Manufacturing arose and wound their way through the Board and the courts, the Board had not announced any such policy, either in binding Rules and Regulations or in its nonbinding Field or Casehandling Manuals.37/

36/ The Board's brief in Florida Steel contains a passing, ambiguous "concession," as follows: "While it is true that employees are free to seek legal counsel, this does not immunize from violations employer statements that end to coerce employees from giving evidence to the Board." I do not know if any further "concession" was made in oral argument.

37/ The Board's first publicly available Field Manual was issued in 1967. At

The original 1967 Field Manual governing unfair labor practice proceedings contained no provisions for or reference to any right to counsel in Board investigations. The 1975 version

---

(footnote continued from previous page) that time, portions of the previously existing internal instructions to field employees of the Board were withheld from publication. However, with the publication of the Casehandling Manual, 1975, confidentiality of general instructions to field personnel was ended. The Casehandling Manual has at all times contained the following prefatory statement:

> Purpose of Manual
>
> This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide procedural and operational guidance for the Agency's staff in administering the National Labor Relations Act, and is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the

of the Casehandling Manual contained a carefully restricted provision for the right of a cooperative respondent's counsel or representative to be present when a Board agent interviewed "any supervisor or agent whose statements bind a respondent."38/ In November 1978 a provision was added giving a charging party the right to have counsel or a representative present during a Board

---

(footnote continued from previous page) law. The guides are not General Counsel or Board rulings or directives and are not a form of authority binding upon the General Counsel or upon the Board.

38/ The Casehandling Manual also provides for advising parties of their right to counsel in the initial notifications of the receipt of a charge. However, such initial notice is cursory and does not define the nature or extent of the right to counsel. The provisions discussed in the text herein relate specifically to investigations.

agent's interview "of the charging party or any supervisor whose statements or actions would bind the charging party." It was not until March 17, 1980, that the manual contained any provision concerning a right of witnesses to have counsel in the course of a Board investigation.39/

39/ That provision (not present at the time here involved) reads:

> 10056.2 Interviews of Witnesses: Where a witness, whether offered by the charging party or the charged party, who is not a representative or an agent of any party to the proceeding is represented by counsel or other representative and the witness requests that counsel or other representative be present during an interview, the interview should be conducted with counsel or other representative present so long as this presence does not delay or hamper the interview. This policy will normally nor prevail where counsel or other representative also represents a party to the case unless the Region, in the exercise of its discretion, wishes to proceed with the interview under such circumstances. In the

This matter is of particular importance in view of the apparent underpinning of the courts' decision in Florida Steel and Garry Manufacturing. For example, in Florida Steel, the court said:

> . . . Our case involves the advising of employees of one of the most treasured and sacred rights possessed by citizens of this nation. Thus we need go no further than to say that we can conceive of no circumstances where accurately informing an employee of his right to counsel could amount to an interference, restraint, or act of coercion.

(footnote continued from previous page)
event the Region declines to proceed with the interview of the witness in the presence of counsel or other representative, the witness should be advised that he or she may submit documentary evidence or a statement which, if timely submitted, will be considered.

On innumerable occasions the federal courts, including the Supreme Court, Courts of Appeals and District Courts, have pointed out that there is no constitutional right, under the Fifth, Sixth or Fourteenth Amendments, to representation by counsel except in criminal proceedings. See, e.g., Hannah v. Larche 363 U.S. 420 (1960); F.C.C. v. Schreiber, 329 F.2d 517 (C.A. 9, 1964), mod'd. on other grounds, 381 U.S. 279 (1965); Smith v. U.S., 250 F. Supp. 803, 806 (D.N.J., 1966) app. dis., 377 F.2d 739 (C.A. 3, 1967); U.S. v. Wierzchucki, 248 F. Supp. 788 (W. D. Wis. 965); Suess v. Pugh, 245 F. Supp. 661 (N.D. W.Va. 1965); Ferguson v. Gathright, 485 F.2d 504, 506 (C.A. 4, 1973), and cases cited at footnote 3 therein, cert. denied, 415

U.S. 933 (1945). The absence of a right to representation by counsel in noncriminal proceedings has been upheld even where the "witness" involved is the "target" of the proceeding and personally subject to adverse action therein. A Presidential Order expressly prohibiting Selective Service registrants from being represented by counsel before local draft boards has been upheld even though their draft classifications could be subjected to only very limited review in subsequent criminal trials for draft evasion. Cf. U.S. v. Wierzchucki, supra. A doctor has been held not entitled to representation by counsel in a hearing on charges against him which could result in termination of his temporary employment by the Veterans' Administration. Suess

v. Pugh, supra. And the respondent in a state proceeding to revoke a driver's license was held not to have a constitutional right to representation by counsel even though he could later be (and was) convicted of a criminal offense and have his existing parole revoked, if he drove after the revocation. The absence of a constitutional right to representation by counsel if a fortiori applicable to "investigations . . . of a fact-finding, non-adjudicative nature." Smith v. U.S., supra, 250 F. Supp. at 806.

Any right to representation by counsel in noncriminal proceedings must be dependent upon a statutory or regulatory provision. The only statutory provision possibly relevant is Section

6(b) of the Administrative Procedure Act (now 5 U.S.C. Sec. 555(b)), which reads, in pertinent part:

> A person compelled to appear in person before any agency or representative thereof is entitled to be accompanied, represented, and advised by counsel . . . 40/

As was noted in U.S. v. Steel, 238 F. Supp. 575, 577 (S.D. N.Y., 1965), affd. 359 F.2d 381 (C.A. 2, 1966), and Smith v. U.S., supra, 250 F. Supp. at 806, "the Supreme Court has not decided the question as to whether the Administrative Procedure Act affords the right to counsel in a fact-finding non-

---

40/ The section also provides: "A party is entitled to appear in person or by or with counsel or other qualified representative in an agency proceeding." (Emphasis supplied). As previously noted the Board expressly recognizes this right of parties. It is unnecessary here to define the word "proceeding" within the purview of this provision.

adjudicative investigation." Whatever the proper answer to that question, it is clear that the statutory provision applies only "to persons compelled to appear." Ibid.; U.S. v. Murray, 297 F.2d 812, 820-821 (C.A. 2, 1962), cert. denied, 369 U.S. 828 (1962); Suess v. Pugh, supra, 245 F. Supp. at 664 (quoting the Attorney General's Manual on the Administrative Procedure Act, 1947, pp. 61-62).

An underlying vice in an employer's advising his employees that they are entitled to representation by counsel in interviews with Board agents is the necessary implication that the employees might need protection. The present case involves a charge against the employer. In no way could the

interview result in any adverse action against or legal detriment to any employee.41/ But the employer's indication that employees might need the protection of counsel manifestly would tend to dissuade them from cooperating with the Board's investigation.

Respondent's conduct in the present case is improper and clearly coercive for an additional and perhaps more telling, reason. Respondent offered the services of its own attorney in the Boards' investigation of charges against Respondent--charges that it had violated the employees' rights vis-a-vis Respondent. An employee who accepted Respondent's suggestion that he be

41/ Of course, the employee's Fifth Amendment rights would be protected if necessary.

accompanied by counsel would reasonably also accept the offered services of Respondent's attorney, since securing independent counsel would entail expense and, probably, inconvenience. Respondent is thus temptingly proposing a serious conflict of interests. There is no apparent way that any attorney could properly advise and represent both employees and the employer who has been accused of violating their rights.

As shown above (fn. 39), the Board, as a general rule, expressly prohibits representation of witnesses by counsel for any party to the proceeding. Other administrative agencies and courts have been sensitive of the dangers, both to "witnesses" and to the regulatory agencies, inherent in multiple

representation by counsel. See e.g., U.S. v. Smith, 87 F. Supp. 293 (D. Conn., 1949), where the court held that, under Section 6(b) of the Administrative Procedure Act, an officer, a director and a stockholder of a corporation were entitled to representation by counsel when subpoenaed to appear before a Special Agent of the Bureau of Internal Revenue in an investigation of the corporation, but then (p. 294) restricted them to "the presence only of outside counsel (other than counsel for the taxpayer) for the witnesses to advise upon their constitutional rights." Similarly, in U.S. v. Steel, supra, 238 F. Supp. 575, the court sustained a regulation and ruling of the S.E.C. that a person subpoenaed in the course of a

fraud investigation could be "accompanied, represented and advised by counsel, but such counsel may not represent any other witnesses or any person being investigated unless permitted in the discretion of the [S.E.C] officer ... upon being satisfied that there is no conflict of interest in such representation and that the presence of identical counsel for other witnesses or persons being investigated would not hinder the course of the investigation."

The most fearless employee would find it difficult to provide the Board with information against his employer when he was accompanied and being "advised" by the employer's counsel. The Board, with judicial approval, has consistently held that an

employer violates the Act when it requests that employees furnish him copies of, or repeat to him the substance of, statements they have given to the Board. Winn-Dixie Stores, Inc., 143 NLRB 848, 849-850 (1963), enfd., 341 F.2d 750 752-753 C.A. 6, 1965), cert. denied, 382 U.S. 830; Siegel Co., 143 NLRB 386, fn. 1 (1963), enfd., 328 F.2d 25, 27 (C.A. 2, 1974). If such requests are coercive, a fortiori the presence of the employer's counsel when such statements are given would be coercive. Even if an employee sua sponte requested representation by the employer's attorney, the Board could properly deny the request because of the inhibiting effect of such representation

on the employee's freely providing full and accurate information. Cf. Hannah v. Larche, supra, 363 U.S. at 454-485.

Accordingly, on the authority of the Board's decisions in Florida Steel and Garry Manufacturing, supra, and for the further considerations set forth above, I find that, as alleged, Respondent coerced the employees and interfered with their Section 7 rights when Korcz volunteered that they could be represented by counsel in interviews with Board agents and offered them the services of Respondent's counsel.

The evidence establishes that Korcz advised the employees that they need not speak to Board agents who might seek interviews with them. Although the amendment to the complaint made orally at

the trial does not specifically allege such statements as violative of the Act, they are intertwined with the statements alleged. Although Korcz testified after employees attributed such statements to him he did not disavow them. Accordingly, their lawfulness may be decided herein. Pioneer Natural Gas Company, 253 NLRB No. 3, slip. op. p. 2, n. 2 (1980); Gordonsville Industries, Inc., 252 NLRB No. 54, slip op. p. 5, n. 7 (1980).

The Board has held that an employer violates the Act when he advises employees "that they need not cooperate in the Board investigation" even though "it may be technically true that an individual may not be forced to give statements to a Board agent unless

subpoenaed." Certain-Teed Products Corporation, 147 NLRB 1517, 1521, 1520 (1964); R. G. Barry Corp., 162 NLRB 1472, 1476 (1967), enfd. as modified, 405 F.2d 1212 (C.A. 6, 1969), cert. denied, 396 U.S. 838. On the basis of these decisions, I also find that Respondent violated Section 8(a)(1) of the Act of Korcz' stating at employee meetings that the employees could refuse to speak to Board agents investigating the charge in this case. Bryant Chucking Grinder Co. v. N.L.R.B., 389 F.2d 565, 567 (C.A. 2, 1967), cert. denied, 392 U.S. 908.42/

42/ As held in Bryant Chucking Grinder Co., NLRB 1527, 1564 (1966); "Respondent was thus interfering with the employees' right to utilize the statutory protection of their Section 7 rights without fear of reprisal for giving information or testimony adverse to it. This conduct had the tendency to obstruct and impede the Board in its investigation and trial

C. Case No. 3-CB-9714

1. Preliminary considerations

As previously stated, on April 7, 1980, the Union filed a second charge, on which a complaint was issued on May 8, alleging, in the main, that Respondent had committed numerous unfair labor practices connected with or arising out of the prior proceeding. The General Counsel then petitioned the United States District Court for the Northern District of New York for an injunction under Section 10(j) of the Act pending Board decision. After a trial, the Court (District Jude Neal P. McCurn) denied the petition. The General Counsel's appeal

---

(footnote continued from previous page)
procedures and to deprive employees of vindication of the Board of their statutory rights."

from that decision is pending in the Court of Appeals for the Second Circuit. The Second Circuit denied a request for injunction pending the appeal.

When the second case came on for trial before me on September 15, 1980, after a pretrial discussion,43/ I granted the joint request of all parties that I accept the transcript of the trial before Judge McCurn in lieu of testimony presented directly to me. Before me, the District Court trial record was supplemented by certain additional material.

In its post-trial brief, Respondent apparently contends that Judge McCurn's decision is binding on me as to

43/ The credibility problem was discussed and I was assured that most of the witnesses had appeared before me in the first trial.

credibility of the witnesses, at least so far as demeanor is involved. However, Judge McCurn made no express, specific findings as to credibility. The record before me clearly shows that all parties understood that I was to appraise credibility independently. Not only did I have the District Court record, but I also had had the opportunity at the first trial to observe many of the witnesses who testified before Judge McCurn. As will appear hereinafter, demeanor plays no part in my resolution of the credibility of persons who did not testify before me. Indeed, all my credibility resolutions are supported by considerations other than mere demeanor.

No evidence was presented to Judge McCurn concerning the matters involved in Case No. 3-CA-9304 and he expressly refused to receive the transcript of the trial in that case. While the substance of the first case may not be germane to the questions whether an injunction should issue during the pendency of the second case, the facts in the earlier case are of inestimable value as background. Conduct alleged as violative of the Act in the second complaint which might, by itself, appear innocent and/or inconsequential may take on a more ominous coloration when seen as a continuation of a flagrantly unlawful course of conduct. Thus, while Judge McCurn's decision on the evidence before

him is entitled to careful and respectful consideration, it is not dispositive of the issues presented in this proceeding.

Judge McCurn held, as a conclusion of law, that the Regional Director "did not have reasonable cause to believe" that Respondent had engaged in the unfair labor practices alleged in the complaint. This conclusion was based at least in part on implicit interpretations of the Act in conflict with the Board's. The Court's decision contains no discussion or citation of any decisions under the Act. The Board is the agency statutorily charged with administering the statute and its decisions can be reviewed and reversed only by Courts in Appeals or the Supreme court under Section 10(e) and (f) of the

Act. Thus, in this proceeding, I am bound by Board precedents even if they conflict with a judicial decision in an ancillary proceeding.

In his brief to the Second Circuit, in support of his unsuccessful attempt to obtain an injunction pending the appeal, the Regional Director said that much of his evidence had been contradicted by Respondent's "and the ultimate merits of the case may not be entirely free from doubt." Respondent would apparently read that statement as somehow a "concession," calling for dismissal of the complaint. But conflict and doubt are in the heart of litigation. This decision sets forth the resolutions which I have been charged with making.

Respondent also argues that the Union's failure to file objections to the conduct of the election, which is lost, amounts to an "admission" to the absence of merit to the present complaint, which alleges pre-elections misconduct. So far as appears, the Union made no attempt to withdraw its charges or to have the complaints dismissed. There is an obvious reason why the Union might reasonably follow the course it did.44/ It has long been recognized that egregious and pervasive unfair labor practices can, and frequently do, so undermine a union's support and contaminate the atmosphere as to make it impossible to hold a fair election within

44/ Union counsel briefly addressed this matter before Judge McCurn. However, the transcript does not clearly show counsel's position.

the immediate or presently forseeable future. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 613-614; Chromalloy Mining and Minerals v. N.L.R.B., F.2d , 104 LRRM 2987, 2995-2996 (C.A. 5, 1980); Pay'n Save Corp., 247 NLRB No. 184, slip op. p. 4 (1980); N.L.R.B. v. Gissel, Supra, 395 U.S. at 613-614. Although the Union claimed a majority and requested a card check on September 5, 1979, the complaints do not allege violation of Section 8(a)(5) and the General Counsel did not attempt to establish a union majority. The Union could no expect to gain anything by pursuing election objections; in the absence of the majority showing, it could not hope for a bargaining order[45/] and, until the unfair

45/ All the events involved antedated the Third Circuit's decision in United

labor practices were remedied and the employees were assured that their statutory rights would be protected, the Union could not reasonably hope to win a second election. And it was virtually impossible for any relief to be forthcoming within the year before a new petition could be filed. A second election loss within that year might well further undermine the Union's hances for ultimate success. Thus, rejecting Respondent's argument, I draw no adverse inference from the Union's failure to file objections to the conduct of the election. In any event, the General Counsel would not be bound by any express

---

(footnote continued from previous page)
Dairy Farmers Coop. Assn., v. N.L.R.B., F.2d 105 LRRM 3034, 3041-3045 (Oct. 31, 1980).

or implied "concession" by the Union unless the Regional Director formally granted a request to withdraw the charges.

2. The alleged violations

The complaint alleges that after the trial in Case No. 3-CA-9304, Respondent harassed employees who supported the Union and/or cooperated with the Board in the earlier proceedings. Employees who had been subjected to the coercive and intimidating conduct heretofore found would normally be particularly sensitive to the message conveyed by further action by the employer, no matter its sophistication. Coercion is not rendered less violative of the Act by increase in the employer's subtlety. Ohio Hoist Mfg.

Co., 189 NLRB 687, 687-688 (1971). The detailed allegations of the complaint will here be considered in the light of Respondent's past conduct.

a. Section 8(a)(1)

(1) Conduct of President Manfred Brecker

On April 2, 1980, Respondent's president, Manfred Brecker, paid an unusual visit to the Herkimer store.46/ On April 2 and 3 and thereafter he conducted meetings of small groups of employees, attended also by the employees' supervisor. He then held meetings of all store employees and

46/ There is no evidence of any prior visit, and in a letter to the employees, dated April 15, the Union said: "Recently, the president of S. E. Nichols Co., paid a visit to Herkimer for the first time in many years. Stop and think about it, all these years before he bothered to leave New York City to come Upstate and show his 'concern' . . . "

supervisory personnel, on April 18 and June 5. It is alleged that in the course of these meetings Brecker committed numerous unfair labor practices.

(a) Credibility

At the outset, it should be noted that Brecker did not testify before Judge McCurn. Further, no tapes or stenographic transcripts of these or other employee meetings were offered in evidence, although tapes and/or transcripts were made.47/ Korcz and Hathorn did no testify at any length or in any depth about Brecker's meetings.

47/ The evidence establishes that Respondent regularly records such campaign meetings. Respondent introduced into evidence a tape of a meeting conducted by Brecker in the Marcy store. S. E. Nichols Marcy Corp., 229 NLRB 75, 80, n. 10 (1977).

The General Counsel's witnesses were Klimacek, Goldsmith and Pumilio, alleged as discriminatees in Case No. 3-CA-9714. In addition to supervisory personnel, four employees were presented by Respondent. Specific deficiencies in their testimony will be noted below. However, some general observations are appropriate at this point.

Before Judge McCurn, Respondent's counsel argue that one employee, Jospeh J. Nicolette, "who has no ax to grind . . . took courage to come in and testify against someone he works for." Nicolette was called by and testified in favor of Respondent. Additionally, he had received a wage increase in May. Similarly, employees Rose Stagliano and Judith Guise also had

received raises in May. Stagliano also circulated an antiunion petition and passed out "No' buttons to employees while working in the store. Edward Lintz had recently transferred to the Herkimer store from the Marcy store, where he had been vocally and conspicuously antiunion. These four employees testified in favor of Respondent. On the other hand, Klimacek, Goldsmith and Pumilio obviously desired to keep their jobs yet testified against Respondent. Thus, it is the General Counsel's employee witnesses who are entitled to the benefit of the principle invoked by Respondent's counsel. Rodeway Inn of Las Vegas, 252 NLRB No. 53, JD slip op. p. 4 (1980).

(b) The alleged violations

The complaint alleges that Brecker threatened a loss of benefits if the Union were voted in and said that "Respondent would not negotiate with the Union." Klimacek testified that, on April 2, Brecker "said that if the Union got in he would negotiate with them but we might end up with less than what we have already." Although assistant manager Bifora had attended the meeting, he did not testify. Klimacek also testified that at a storewide meeting Brecker "said he didn't have a negotiate with the Union but he would; but we would probably end up, we could end up, with less than we had now." Goldsmith testified that Brecker said:

> [W]hen the Union comes in you will lose your benefits . . . we will have to start all over

> negotiating; you don't know what you are going to earn . . . right here I have your benefits and you know what you have, so we should keep them.

In my opinion, Brecker's statements, as quoted, do not amount to anticipatory refusals to bargain, as alleged. However, they carry on the "bargaining" from scratch" motif of Korcz' statements, previously found to be violative of Section 8(a)(1). In the context of Respondent's unrelenting assault on unionization, the statements would naturally engender a fear in the employees that they would lose existing benefits if they chose union representation.

Klimacek testified that on April 2 Brecker also said that "Dottie Reinhardt was fired for being the head of

the walkout and that it was her fault that Kris Burkle and Denise Styles got fired." When Klimacek interjected that Reinhardt had not sponsored the proposal of a walkout on September 1, 1979, but rather had "told everybody to stay in the store and to get some kind of representation," Brecker, obviously angry and agitated, replied that Klimacek "didn't know what [she] was talking about and that he knew more about what was going on in that store than [Klimacek] did." This undenied testimony by Klimacek establishes that Brecker violated the Act by informing employees that other employees had been discharged for protected concerted activities.48/

48/ Becker's statement also appears to have created the impression of employer surveillance of employees' protected activities. However, since

Pumilio and Goldsmith testified that in April meetings Brecker said the Board was a "kangaroo court," the ALJ was a "kangaroo" and Board employees and agents were "idiots and jerks." Guise testified that she did not recall any such statement and Stagliano did not recall Brecker's ever having said anything derogatory about the Board. In the June 5 all-employee meetings, Brecker adopted "humor"as his major weapon.49/

(footnote continued from previous page) no such specific allegation is made in the complaint, no corresponding finding of violation is here made.

49/ This is apparently Becker's established tactic. See S. E. Nichols Marcy Corp., supra, 229 NLRB at 80: "Becker further stated that his meeting[s] with employees were 'pretty happy ones,' jokes were told, different employees also spoke, and he said he was under the impression that everyone enjoyed his meetings."

The principal butts and Brecker's ridicule were the Board and its agents, along with the present complaint and the employees named therein as discriminatees. Brecker read the complaint paragraph by paragraph, commenting on each. According to Klimacek, Brecker indicated disagreement with the allegations, which he indicated were worthy only of ridicule and disdain. Theatrically, he mocked the notion that he and the management representatives named in the complaint could be considered "criminal." In mock histrionics, he had each named company agent rise to deny the complaint allegations against him. The charade produced considerable laughter. As Klimacek stated, Brecker "read [the

complaint] went through calling everybody a criminal and had everybody laughing and making a big joke out of it." He also called on the three alleged discriminatees to comment on the allegations concerning them. Against the backdrop of manipulated hilarity, the discriminatees could scarcely receive any sympathetic reaction but, on the contrary, could only be embarrassed.

Goldsmith testified that at the June 5 meeting Brecker denied ever having referred to the Board as a "kangaroo court" or to Board agents as "idiots and jerks." According to Pumilio and Goldsmith, Brecker said he could not remember his own past statements and indicated that the employees must have equally faulty memories and this if they

claimed they "know word for word what he said, [they] had to be lying." Stagliano also testified that Brecker denied the "kangaroo court" and "idiots and jerks" allegation.50/ The heresay testimony concerning Brecker's self-serving denials on June 5 are entitled to no weight. He did not testify and subject himself to cross-examination. Additionally, Respondent did not present any tapes or stenographic transcripts of the April meetings. The "kangaroo court" allegation is circumstantially corroborated by documentary evidence. In

50/ She placed Brecker's denial at a small employee meeting early in March. But the first trial did not start until March 17 and Becker did not meet with any employees until April 2. The complaint was issued on June 8.

a letter to employees dated April 15, the Union referred to Brecker's first meetings and said:

> . . . [Brecker] proceeded to make will attacks on unions in general, Local One in particular, and even the National Labor Relations Board . . . . The NLRB is far from being a kangaroo court.

The Union's reference to a "kangaroo court" would appear strange except as a response to a prior statement by Brecker.

Many of Brecker's criticisms of the Board were not made under the guise of humor. There was considerable testimony that, in one form or another, Brecker impressed upon the employees that Board proceedings would be entirely futile in protecting employees' statutory rights, since the Board had no concern for the employees and Respondent was

adept at frustrating the Board's remedial process. For example, Pumilio testified that at a meeting with about eight employees on April 2 or 3 Brecker--

> said there would be no way in hell that [Reinhardt, Vincent, Styles and Burkle] would ever come back and work in his store; they would have to go to the Supreme Court before he would let them in.

Employee Klimacek also quoted Brecker as saying that "hell would have to freeze over before they would get hired again." Similarly, Goldsmith testified that Brecker--

> said that he would not reinstate people that participated in Union activities . . . and he also said some of these cases will go to court for eight to ten years; they will take a long time; he will keep appealing them until they get to the highest [Supreme] court and he said he would never give any back pay and he hoped they didn't ever expect it especially for eight years back . . .

Goldsmith testified that when she stated here understanding that some employees had been reinstated at the Marcy store, Brecker--

> said "Well, wait a minute, let me think" and he goes on, "Yes, I do recall two people being reinstated," he goes, "but I just did that to settle, it." He goes, "A few people I have given back pay just to get rid of them," and they he said "When they do come back they don't last because people don't get along with them and I consider them troublemakers and then they leave."51/

Pumilio testified that in a meeting with a small group of employees on April 2 or 3--

> [Brecker] said that the Federal Labor Board didn't care about us, they weren't really worried about

---

51/ Contrast Respondent's protestations, in the employee handbook and in employee meetings, that Respondent will protect employees from being "harassed" by solicitation of union cards and "threats" by union supporters.

> it, and he mentioned something about--I didn't really understand what he meant by it, but he said the people who worked on the side of the Federal Labor Board if a Union came in, they would have no need for us and we would probably be fired.

Goldsmith cast a little more light on the subject. She testified that Brecker said "the Labor Board is working for the unions" and, if the Union got in, it would control employment, jeopardizing the jobs of present employees.52/ The purport of the statement was clear: Brecker was effectively saying the Respondent eventually could, and probably would, fire union supporters with

---

52/ Her testimony was: "[Brecker] said the unions are working--the Labor Board is working for the unions and he said that the Labor Board is not, you know, you would get hired out through the unions, that is how they are making their money."

impunity, since the Board would have no interest in protecting them after they had testified in support of the pending complaints.

There was credited testimony that Brecker bragged that, while it might lose some cases before the Board, it won its "big" cases in the courts. As set forth below, Korcz repeated this message. However, the facts do not support the boast. Respondent's batting average before the Board and the courts is low by any objective standard.

The foregoing evidence establishes that Brecker proclaimed that, the Board was furthering unions but was both unable and unwilling to protect employee's statutory rights. Be boasted of his past success in resisting the

remedial processes of the Act and exuded consummate optimism of his continued success in the future. He left no doubt that the Board was no match for Respondent and thus employee resort to the Board would be futile. And the fate of the employees who had initiated the union campaign advanced futility to extreme danger. The message, in short, was that the employees were at the mercy of Respondent, on whom they were economically dependent, and could expect no protection from the Board.

The right to criticize and satirize the government and its agents is a basic privilege of citizens in a democracy. Whatever one may think of the estate of crass ridicule of a tribunal by a party to a pending case, it does not of

itself constitute an unfair labor practice. The Board has survived intact as least its fair share of criticism, including parody and ridicule.

It has clearly held that criticism of the Board is not in itself violative of the Act. Speed Queen, 195 NLRB 462 (1972). But the precious right of free speech does not extend to protect an employer's intimidating his employees not to use statutorily provided protection from depredations by their employer. Statements by an employer not unlawful in themselves may be violative of the Act "in a context of unfair labor practices." Ibid., p. 463, n. 1, referring to the Brearley Company, 163 NLRB 637, 638, n. 1 (1967). Respondent's offense lay not in its criticism of the

Board, but in its message that resort to the Board would be futile. Scott's, Inc., 159 NLRB 1795, 1796-1797 (1966), enfd. 383 F.2d 230 (D.C. Cir. 1967).53/ Particularly where, as here, the employees had already seen the severe punishment Respondent meted out to employees who exercised their statutory rights, it is difficult to imagine more coercive and threatening conduct than propounding the futility of resort to the Board, which was asserted to be no match for Respondent. The use of humor does not render noncoercive, and thus lawful, conduct which has a necessary, natural tendency to dissuade employees from using their statutory tools to protect their

53/ Cases cited in Respondent sustaining employees' right to criticize unions obviously have no bearing on the issue here involved.

rights. As Respondent has previously been told, the test of employer conduct is "whether the conduct is reasonably calculated or tends to interfere with the free exercise of the rights guaranteed by the Act." S. E. Nichols Marcy Corp., supra, 229 NLRB at 80.

The present record clearly establishes that, through coercion and misrepresentation, Brecker interfered with Respondent's employees' availing themselves of the protections of the Act.54/ In the course of committing this violation, Brecker also managed to

---

54/ At least to some extent, Brecker's efforts were successful. At the June 5 meeting Goldsmith was placed on the defensive, protesting that she had not intended that information she provided to a Board agent would be used as the basis of charges against Respondent.

violate the Act by, inter alia, stating that other employees had been discharged for union and protected activities; threatening a loss of benefits in the event of unionization; threatening loss of job security in the event of unionization; and threatening refusal to reinstate or retain discriminatorily discharged employees.

(2) Conduct a division supervisor Henry Korcz Korcz' campaign activities before the trial in Case No. 3-CA-9304 have been discussed above. The evidence establishes that he followed much the same pattern during the rest of the pre-election period.

The complaint alleges that Korcz participated in a campaign of "[d]isaparaging the Board's processes by informing [Respondent's] employees that the Labor Board wins the small cases but Respondent always wins in the end." Klimacek credibly testified that Brecker had made statements to the effect at a small meeting on April 2 and at a meeting of all employees and supervisory personnel on June 5. Korcz testified to having repeated Brecker's views at a meeting on April 18.55/

55/ He testified that before holding employee meetings he discussed them with Brecker. He proceeded to state that in such a discussion before the April 18 employee meeting "and during the time of that conversation, Mr. Brecker said that he had won a big case, or he had won, and he said in Board hearings we lose, but in the courts we win. And this is what I told the employees, that we won a case in the courts, but we lose them

Again, Respondent was attempting to convince the employees that the Board was powerless to protect them from Respondent's misconduct. The facts are that in litigated cases courts have ordered enforcement of Board orders against Respondent and Respondent has been held in contempt of judicial enforcement orders. Respondent's dubious success has not been achieved in the courts but its contumacious floating of the courts and the Board.

The Union's letter of April 15 to the employees said that at Herkimer Respondent was using the same tactics as it had at Marcy. In an employee meeting on April 26 Korcz said that the Union was

---

(footnote continued from previous page)
before the Board."

right in that statement. According to Korcz, Respondent's tactics at Marcy had been to disseminate the truth. As hitherto noted, however, the Board disagreed and found that Respondent's Marcy campaign included massive unfair labor practices.

The complaint further alleges that Korcz "[d]iscouraged its employees from attending a Union meeting." Goldsmith testified that on March 31, at a meeting with about six employees, Korcz referred to an announcement of a union meeting and said "he wanted to let everyone know they did not have to attend even though it sounded like they were forcing you to attend, it's up to you." The union announcement does not expressly or impliedly indicate that attendance at

the meeting was compulsory. Thus Korcz went out of his way to suggest that employees not attend. However, he did leave it up to the employees. They were able to read the meeting announcement and appraise Korcz' comment. I find that, under the circumstances, Korcz' conduct did not violate the Act.

(3) Store Manager Robert Hathorn

The complaint alleges that Hathorn improperly questioned employees as to the testimony they were going to give at the first trial. Klimacek and Pumilio both informed Hathorn when they were subpoenaed by the General Counsel to appear at the hearing in March. Klimacek testified that Hathorn "asked [her] if [she] knew what it was all about and [she] told him not really and he said it

was to do with the Union." Thereafter, Hathorn asked her if she had received any telephone calls about the subpoena and she replied in the negative. Pumilio testified that when he first told Hathorn about the subpoena, Hathorn merely said that it was nothing to worry about and Pumilio should "just tell the truth and everything will be all right." Later that day, however, Hathorn joined Pumilio who was talking with another employee. According to Pumilio, Hathorn "was wondering why the Federal Labor Board wanted [Pumilio] to testify." Pumilio said he did not know and then ignored Hathorn's repetition of the inquiry. Hathorn in essence corroborated Klimacek's testimony and Pumilio's testimony concerning his first

conversation, but denied having had the second conversation reported by Pumilio. I credit Pumilio.

Hathorn did not directly ask either Pumilio or Klimacek what they would testify to at the hearing. But Hathorn knew that the subpoenas had been issued on behalf of the General Counsel and therefore presumably the employees' testimony would support the complaint. Thus, by wondering out loud why they had been subpoenaed, Hathorn clearly was inviting the two employees to reveal what information, if any, they had given to the Board and what testimony Respondent would have to meet at the trial.

Particularly when viewed in the context of Respondent's aggressive campaign, which included attempts to

frustrate Board processes, Hathorn's implied probing of Klimacek's and Pumilio's prospective testimony constituted coercive interrogation violative of Section 8(a)(1) of the Act.

(4) Edward Lintz

The complaint alleges that Edward Lintz, an agent of Respondent, threatened employees with possible closure of the Herkimer store if the employees chose to be represented by the Union. The evidence leaves no doubt that at an employee meeting held by Brecker on April 18, Lintz spoke for about 15 minutes. He said that if the Union got in, wages would probably rise but the store would be unable to absorb such increases for all employees, with the result that some would be laid off and

the rest would have to work twice as hard as they had in the past. Additionally, Lintz said that grocery stores had been going out of business and retail stores could not continue operations with a union. According to Goldsmith, Lintz "said other stores have closed down from unions being there but it doesn't mean the Herkimer store will close down." There was no contradiction of testimony by Klimacek, Pumilio and Goldsmith that throughout Lintz' speech Korcz smilingly nodded his approval and agreement. Goldsmith testified that Brecker said he agreed with Lintz' statement. Brecker also said that if Lintz was considered Respondent's agent, Goldsmith, Pumilio and Klimacek, the alleged discriminatees, would be deemed agents of the Union.

In reviewing the present complaint at the June 5 meeting, Brecker called upon Lintz to comment on the allegation concerning him. Lintz seized the opportunity to repeat his previous message. According to Goldsmith, Lintz said that he had previously "said a lot of stores had closed down but he didn't say the Herkimer store would close down." Klimacek said that Lintz then said that the Union had been defeated at Marcy and repeated that under a union "there would be less manpower for more money and that [the employees] would be working harder and that the store could possibly close." According to Klimacek, Brecker said that Lintz was merely an employee "and that anything Edward Lintz said was not any kind of reflection on the company." But

there is no evidence that Brecker or Korcz ever disavowed the substance of Lintz' statements.

Respondent's only defense to the allegation concerning Lintz is that he was not an "agent" of Respondent and thus Respondent cannot be held responsible for his statements. Lintz had been working at the Herkimer store only about a week before the meeting at which he spoke. He had previously worked at the Marcy Store, where he ardently worked against the Union. His unexplained transfer during the active pre-election campaign strongly suggests that it was motivated by his known antiunion sentiments. Although the complaint specifically alleged that Lintz was an "agent" of Respondent, Respondent

did not present him as a witness. Respondent argues that an adverse inference should be drawn from the General Counsel's failure to subpoena Lintz. But the General Counsel was not required to present the target of the complaint. I find that Respondent's unexplained failure to call Lintz and Brecker warrants an inference that they could not corroborate Korcz' denial that he knew Lintz would speak at the meeting.

By permitting Lintz to speak at length on April 18 and then inviting a repetition on June 5, and signifying approval and agreement, Brecker in effect adopted Lintz' views. Thus Respondent is responsible for Lintz' statements, which contained threats of store closure, loss of employment and increased work burden,

in violation of Section 8(a)(1) of the Act. Viking of Minneapolis, 171 NLRB 1155, 1156 (1968). See also Litho Press of San Antonio, 211 NLRB 1014, 1015-1016 (1974), enfd. 512 F.2d 73 (C.A. 5, 1975); Dal-Tex Optical Company, 152 NLRB 1317 (1965), enfd., 378 F.2d 443 (C.A. 5, 1967).

(5) Shrinkage bonus

An amendment to the complaint alleges that on June 5, shortly before the election, Brecker announced that the Herkimer store would receive a $2,000 "shrinkage bonus," to be distributed among the employees and supervisors. No such bonus had ever been granted before at the Herkimer store.

According to Korcz, Respondent has a practice of granting bonuses to stores where the amount of loss from shoplifting, pilferage, etc., has been reduced during the preceding year. There is no written statement of any such policy or practice and, so far as appears, the Herkimer employees had never previously been informed thereof. Respondent provided no details such as the method of formula for determining a store's entitlement to a bonus or the timing and amount thereof. The only evidence concerning bonuses granted to other stores was that those in Marcy and New Hartford had recently received their first. Herkimer is about 13 miles from Utica and, according to a system map placed in evidence by Respondent, the

Marcy and New Hartford stores are in the Utica metropolitan area. Korcz, who had previously served as manager of each of these stores, has been found to have committed numerous unfair labor practices at Marcy. By itself, the fact that such bonuses had recently been awarded for the first time at Marcy and New Hartford has no tendency to prove any established company policy.

An amendment to the complaint made on September 3, 1980, alleges that on September 3, 1980, Respondent unlawfully granted the promised shrinkage bonus. At the hearing on September 15 the General counsel withdrew that allegation. Respondent argues that the withdrawal "constitutes an admission by the Board that it does not have evidence

to show that granting the bonuses was an unfair labor practice" and thus it "follows as matter of logic that promising the shrinkage bonus was not done to discourage Union activity." As noted above, on September 15 all counsel desired to submit the case on the District Court record. Since the bonus was allegedly granted on September 3, obviously it could not have been litigated in the District Court trial in July. Under the circumstances, no adverse inference can be drawn from the General Counsel's withdrawing the allegation that the bonus was granted.

The promise of a new benefit made before the election was clearly violative of the Act. Whether the subsequent grant of the bonus (which is

impliedly confirmed in Respondent's brief) also violated the Act is not before me.

b. Section 8(a)(3) and (4)

(1) June E. Klimacek

Klimacek works in the automotives department. She and Hathorn testified that before the trial he passed through the automotives department just a few times a day. Klimacek testified that, beginning on March 19, the day after she testified, Hathorn visited the department more frequently and for longer periods, standing around, "just keeping an eye on" Klimacek.

Toward the end of March, Klimacek was instructed to load 39 cases of snowmobile oil in a tractor-trailer onto a pallet for transfer to a Nichols

truck. When she asked for some assistance, Hathorn spoke to the truckdriver and then informed Klimacek that thee was nobody to help her. She testified that before then she had always been given assistance in such loading or unloading operations. Hathorn testified that when Klimacek asked for help, he replied: "Why don't you get a stock boy to help you do it." Hathorn did not provide any details, such as the availability of a stock boy. I credit Klimacek's testimony that, contrary to past practice, she had to perform the job unassisted.

On the same day Klimacek was paged to the front of the store to pick up some refunds. As she was proceeding, Korcz stopped her and asked why she had

left her department unattended and why she was wearing a Nichols garage jacket rather than a smock. She explained that she had been paged and the person operating the home center keeps an eye on the automotive department in such cases.

Female employees are required to "wear the store smock[56] whenever they're on the sales floor, in the office, or at the register." However, Klimacek testified that she has "always worn a garage jacket" and had not previously been rebuked therefor. As described, the jacket appears most

---

56/ This appears in the "Dress Code" in the 1980 employee handbook. The "Dress Code" in the earlier version was considerably shorter and very general, saying that, when dealing with the public, employees "should choose the appropriate attire" and that "appearance and grooming" largely determine the first impression one makes on others.

suitable for loading tasks such as she did that day. Korcz testified that wearing of smocks "is important because by wearing the smocks, they identify themselves as Nichols personnel," which "helps to prevent shoplifting," and the smock "protects the clothing of the individual." The garage jacket also contains the Nichols name, thus providing the desired identification. The employee handbook tells employees to wear their identification badges with their names "prominently displayed" at all times. Selling as such presents little danger to an employee's clothing and the males sales personnel wear no smocks or similar "protective" garments.

The next day Klimacek bought some candy Easter eggs. When, in answer to Hathorn's inquiry, she said she was going to eat them in the department, he told them from her, threw them on the counter and said they would be in the front to the store when she wanted them. She replied that other employees ate while on duty but refused to "squeal on" any. The employee handbook contains no rule about eating. The absence is networthy because the "General Rules to Remember" (formerly called "General Tips") does tell employees to "[a]void chewing gum during working hours." Employee Beverly Stagliano, called by Respondent, testified that Hathorn had told the employees that they were not to eat or smoke on the selling floor.

Employee Rose Ceneviva did not testify to any such general admonition but opined that "the employees should know that they shouldn't be eating in front of customers." The evidence establishes that, if there is any "rule" against employees' eating while at work, it is more honored in the breach than in the observance. For example, on cross-examination, Ceneviva testified that she had seen employees eat or during in their departments at least once a week; that, despite supervisory knowledge of such activities, the only "enforcement" of the rule that she know of occurred about 5 months previously, when an assistant manager told her not to take a drink onto the selling floor. Guise testified that she was reprimanded "everytime [she] was

caught," but nonetheless she continued to eat and/or chew gum in the store. Korcz testified that he had "enforced" the no-eating rule "many times," but the only time he could recall involved the Styles incident, discussed above (pp. 16-19).57/

On April 7, Klimacek was called to the office. Contrary to past practice, the office door was left open during her meeting with Hathorn. Hathorn first discussed the possibility that Klimacek had received too large a refund when she returned a purchased item. That matter was adjusted and Respondent levels no criticism of Klimacek because of this. Hathorn next said that employees Judith Guise, Ceneviva and Marion Dygert "hated"

57/ Ceneviva thinks the antieating rule is "well enforced" but "the employees just don't listen to it."

and "were against" Klimacek. He later eliminated Dygert but said the Guise and Ceneviva had made written statements. He then presented Klimacek with a written "final warning" slip, which said: "Employee had been harassing [sic] other employees and embarrassing [sic] them in front of customers. Has to cooperate with other employees and not complain in front of customers." Klimacek refused to sign the warning slip.

Pursuant to her request, the next day Hathorn gave her copies of typewritten statements by Guise and Ceniviva dated March 28, 1980. Guise's statement recites that while she was relieving Ceniviva at the registered in the home center, a customer asked for help in the automotives department.

Guise went to the department, removed a stereo from behind the counter and took it to her register, where she rang up the sale, thereupon making out a commission slip. When Guise told Klimacek about the incident, Klimacek became irate, rudely asking why Guise had not followed the customary practice of calling Klimacek. Guise's statement adds: "Any time we call June she get mad." Apparently the mutual anger of his occasion concerned entitlement to the commission on the stereo sale. Hathorn, who had seen Guise serving the customer in Klimacek's absence, asked Guise if she would provide a written statement concerning the incident. Guise agreed because, as she testified, she "was mad enough at the time to do anything." Ceneviva's

statement recited that on her luncheon breaks, her register is usually watched by Guise. However, Guise was out sick from March 22 through 26. According to Ceniviva, when asked to watch the register that period Klimacek became upset and "gave [Ceniviva] a hard time." Using a common obscene epithet, Klimacek asked why there were not more employees so that she would not have to neglect her own duties to watch the register. Ceneviva then adds a note of resentment at having to mark merchandise for Klimacek, saying: "Maybe if [Klimacek] would ask me instead of telling me I wouldn't mind it so much." Although her written statement does not so report, Ceneviva testified that in the course of the March incident she twice spoke to

Hathorn and Klimacek did not undertake to relieve Ceneviva until spoken to by Hathorn. Neither Hathorn nor Klimacek testified to that effect.

Hathorn conceded that he had solicited the two employee statements and he had never previously requested or received any such statements. In explanation, he testified:

> [T]he reason being because I understood that June [Klimacek] had testified before the Court, the National Labor Board hearing. I felt it was necessary for her to have another warning for her on the cooperation that she was giving the employees in the store, that she wasn't being cooperative at all, and turned one of the written statements forward to our attorneys to see if it warranted a warning or not for my own protection if I was to warn her.[58/]

58/ At another point Hathorn testified that he sent both employees statements to counsel. Respondent's counsel said that his office had "receive[d] typed statements for

It is significant that Hathorn sought legal advice without making any investigation. It is difficult to understand how he could hope to act fairly without at least hearing Klimacek's side. It is also unclear how counsel could "advise" on a managerial decision without more information.

The testimony of Guise and of Ceneviva clearly shows that they were bent on supporting Respondent's position. Ceneviva, especially, attempted to avoid answering questions which might have adduced evidence adverse to Respondent.59/ Her desire led to

---

(footnote continued from previous page)
review."

59/ One example will suffice to reflect her testimonial attitude:

Q. Isn't it a fact that Mr. Hathorn asked you to write up a

frequent inconsistencies within her testimony. It is perhaps no coincidence that Guise and Ceneviva both received 15-cent per hour wage increase in May.60/

(footnote continued from previous page)
statement against her, isn't that correct?

A. He didn't ask you [sic]. He said it was up to me if I wanted to do it it was my own free will. He didn't tell me I had to write it up or anything like that.

Q. Did he approach you or did you approach him?

A. I don't remember.

Q. Isn't it a fact that he approached you?

A. All right, he approached me.

60/ Hathorn testified that Stagliano and Joseph Nicolette, the two other employees who testified on behalf of Respondent, had also received raises of 15 cents per hour in May.

The record establishes that on December 8, 1979, Klimacek had received a written warning for being uncooperative in helping at the home center register. In answer to that warning, Klimacek maintained, inter alia, that Ceneviva and Jennifer Talbot turned over the register to Klimacek without sufficient money for operation and overstayed the breaks for which Klimacek relieved them. Klimacek testified that she had spoken to assistant manager Worden, her immediate superior, who thereupon timed the employees and reported that Klimacek was indeed right-Ceneviva and her colleague did overstay their allotted breaks. Klimacek testified that she had not requested recall of that warning notice because Worden had assured her that,

while it would be in her file, "it wasn't going to be sent to New York City or anything." In October or Novewmber 1979, after a complaint by Talbot, Hathorn had spoken to Klimacek about operating one of the home center's two registers. Klimacek testified that she had discussed the matter with Worden, who told her to "keep a notebook and to tell him who was taking how much time and when this happened." The notebook she then kept was the basis for her defensive statement to the December written warning. Since Worden did not testify, Klimacek's testimony concerning him is undenied and is credited.

So far as appears, Hathorn did not consult Worden before issuing the April "final warning," which could lead

to discharge on the next claim of misconduct by Klimacek. Thus, Hathorn subjected Klimacek to severe discipline on the one-sided complaints of other employees, solicited by him, without any investigation. Since Hathorn himself testified that his procedure was dictated by the fact that Klimacek had testified in the first hearing, the inference is inescapable that he was building a record for Klimacek's discharge for any claimed misstep in the future.

As noted above, on June 5 Brecker conducted an employee meeting in which he reviewed the complaint item by item. In carrying forward his parody of the complaint, he questioned Klimacek about the allegations concerning her. The evidence leaves no doubt that his

manner of questioning subjected her to ridicule and embarrassment. She refused to answer the questions or make any comments.61/

The foregoing summary of the evidence concerning Respondent's conduct vis-a-vis Klimacek shows a consistent pattern of badgering from the time she revealed that she had been subpoenaed by the General Counsel to testify at the first trial. Accordingly, I find that, as alleged in the complaint, Respondent

---

61/ To avoid the necessity of answering, she said that counsel for the General Counsel had instructed her not to comment on the complaint, but, in testifying, she acknowledged that she had not received any such instruction. Contrary to Respondent's contention, I do not find that her fib at the employee meeting casts any doubt on her testimonial credibility.

discriminated against Klimacek in violation of Section 8(a)(3) and (4) of the Act.62/

(2) Margaret Goldsmith

Goldsmith had worked at the store since around the beginning of 1978 and in the toy department since August 1979. In January 1980 she was also given duties in the furniture department and swimming pools were added to her responsibilities in March. Her predecessor in the toy department had not had such other duties. Before March 24, 1980, when she testified in the first

62/ While the prime motivation appears to have been retaliation for Klimacek's testifying at the first hearing, in violation of Section 8(a)(4), the support of the Union she revealed in testifying also played a part. The affirmative remedy would be the same under either Section 8(a)(3) or 8(a)(4).

trial, she had never been adversely criticized, disciplined or reprimanded. She testified, without contradiction and credibly, that Hathorn and Worden, her immediate supervisor, had praised her work.

Goldsmith testified that before the March hearing Hathorn paid two or three brief visits per day, during which he merely complemented her and never gave her any instructions. However, beginning on Monday, March 24, Hathorn spent considerably more time in the toy department, criticizing and directing her work. She testified that Hathorn prepared a written list prescribing the order in which she was to perform her duties. Goldsmith testified that at that time, she "was behind in work" because of

the hearing the previous week, death of her grandfather, and her having been out of work for illness. Hathorn corroborated that before March he had visited the toy department "about the same as automotives, home improvements, two, three, maybe four times a day" but increased the visits to "five or six times" a day after the hearing. He denied that he had prepared a list of duties for Goldsmith but maintained that the toy department remained a "mess." At Goldsmith's request to Korcz, Hathorn provided her temporary assistance and the department got straightened out. According to Hathorn, the department remained in good condition "about a couple of weeks" but then "started looking bad again, merchandise was

scattered all over the place" through April and May. However, Hathorn also indicated that inventory in the toy department is normally low in January and February, following the Christmas season, and comes in large quantities in the spring, beginning in March. Hathorn also failed to mention Goldsmith's having been out sick and on vacation.

Linda M. Abramczyk, departmental supervisor for eight stores, with her office in New York City, testified that the department had been a "mess" in March and April. She was vague as to dates, saying: "I can't give you specific days. I go in there about every two or three time, four times, a month . . . I would have to look it up on my

calendar."63/ She then testified that during a "full week" she spent there in April, she and Worden straightened out the department. She then conceded that Goldsmith could have done nothing "that particular week" because she was on vacation. In any event, it appears that Abramczyk said nothing to Goldsmith until June, despite her indication that the department's appearance was satisfactory only when she and Worden straightened it up. And then she testified that she had had to work with Goldsmith straightening out the department 3 or 4 hours on each of 20 to 30 visits she had since January, belying Hathorn's contention that a

63/ She also testified: "I have a specific set schedule that I am on."

deterioration in Goldsmith's department required his increased observation after the hearing.

Hathorn conceded that he had taken notes concerning his observations. Goldsmith testified that he had never previously done so. Stagliano testified, with no details, that she had "occasionally" seen Hathorn take notes previously. But, since Stagliano works in the pharmacy, and indicated that she does not have much occasion to observe employees on the general selling floor, her cursory testimony could not overcome Goldsmith's specific testimony. In any event, for reasons shown elsewhere, I find Stagliano to be a most unreliable witness, whose testimony is unworthy of credit.

Before her vacation in April Goldsmith placed under a counter some merchandise which she intended to purchase. During her vacation, Hathorn saw the merchandise and had it removed and placed back on the shelves. Despite considerable testimony to the effect that it was customary for employees so to reserve merchandise for their own purchase, and the supervisory personnel were fully aware of this practice, Respondent maintains that Hathorn's action with respect to Goldsmith's merchandise was proper because of a claimed rule that all merchandise to be purchased by employees was to be taken to the layaway desk and held there until payment. There is no such rule in the employee handbook or in any other written

form. There is considerable evidence that Respondent's representatives knew that at least some employees did not know of any such rule. To establish its existence, Respondent presented Ceneviva and Stagliano. But both of them on cross-examination acknowledged that no such general rule existed or was enforced.64/ Stagliano said that Hathorn

---

64/ Ceneviva's testimony in this connection is illustrative of her testimony generally, and of much of the testimony of other witnesses for Respondent:

> Direct examination: "Q. What should an employee do if they want to buy merchandise for themselves from the store? A. I usually put it in the office on the layaway section, hang it up or on the shelves. Q. And do you know that it is a rule that you shouldn't put it under your counter? A. Yes. Q. Have you ever seen that rule enforced? A. Yes--Well, I haven't, I mean I haven't seen anyone but I have heard that-- . . . It is not in the handbook

had asked that employees not put merchandise under the counters "before Christmas because he didn't want Christmas merchandise . . . underneath counters until after the holidays." and "a couple of times" employees were told by a P.A. announcement to pay by Friday, payday, or "[a]t least before the sale is over," for "any merchandise in their

---

(footnote continued from previous page)
but I mean Mr. Hathorn was said, Don't keep merchandise under your counters or stuff like that." Cross-examination Q. . . . [D]o you in fact know that employees do in fact put merchandise under their counters? A. Yes . . . Q. Isn't it a fact what they do normally is if there is a sale, they are allowed or they do take merchandise on sale and put it under the counters for their purchase, it that correct? A. Yes. Q. That a normal practice in your store, is that right? A. A lot of employees do it, yes. Q. And supervisors are aware of this? A. I guess so, yeah."

stockroom." The best Hathorn could testify was that he "was under assumption at that time all employees were aware of this" rule.

During Brecker's employee meeting on April 2 Goldsmith asked why she had not been given a wage raise in view of her added responsibilities in furniture and pools. After the meeting, Brecker spoke with Goldsmith. Korcz and Hathorn joined them. Brecker said they "were going to have to straighten . . . out" the matter of Goldsmith's pay. After Brecker and Korcz then spoke privately, Brecker returned to Goldsmith and said: "Well, with Union activity we cannot do anything about it right now." When she protested that she had been promised a raise in August, Brecker "said

he couldn't do what the previous manager didn't do and . . . Mr. Genung must not have gotten along with" Goldsmith.65/ Brecker advised Goldsmith to "ask the Union to give [her] a raise. She quoted Brecker as then saying: "If you want a raise, write about [your] hardships to me, I will give it to the Labor Board and the Labor Board will decide whether you can get a raise without my getting any charges."

Not having testified, Brecker obviously did not deny any of Goldsmith's testimony. Nor did Korcz or Hathorn deny it. Hathorn confirmed Brecker's expressed position, saying: "We have constantly put employees off in the store

65/ Contrast Respondent's claim that Genung was discharged for his failure to grant wage increases.

because of the union problems . . . and we didn't want it to be considered as a bribe at that time." Korcz testified to the same effect. When asked how he squared the "bribery" fear with the actual grant of increases to 10 other employees in the month or two before the election, Korcz replied that he "had no concern with the other employees. They were doing their job," but he "excluded [Goldsmith] . . . because she was not doing her job, and [Korcz] was afraid that [he] was going to get accused of bribery." The logic of this position is not apparent: Was he afraid that the Union would claim that giving a raise to an identified union supporter was a "bribe," while simultaneous raises to antiunion employees would go

unchallenged? In any event, the pendency of the Board proceedings was the only reason Brecker gave Goldsmith for withholding her raise; she was not told that her performance was unsatisfactory.

Hathorn testified that because employees were demanding raises during the union campaign he and Korcz, with advice of counsel, "devised a system [by] which we would pass out raises in this respect to make it fair to everybody and what we decided upon was anniversary dates . . . if an employee had been there a year without another raise then they would get a raise." There was no attempt to show that the 10 or so raises granted before the election conformed to the

anniversary formula and the evidence does establish that one employee received a raise in considerably less than a year.

During his satirical review of the second complaint on June 5, Brecker questioned Goldsmith about the accusations involving her. She revealed that, pursuant to his previous advice, she had sought Board approval of a raise for her but the Board could not help. Brecker's calling upon and questioning Goldsmith could not fail to embarrass her before her peers.

The next day Hathorn told Goldsmith that "he didn't want any more harassment charges brought up against him" and in the future he would bring four witnesses when he discussed her department with her. Goldsmith replied

that she had become involved only because she thought Reinhardt's discharge was unfair and would not press any further charges. Thereupon Hathorn said he would bring only one witness when he spoke to her about her department. After initially protesting, Goldsmith said she would not object to the presence of Worden. Hathorn rejected the suggestion, saying that, for his "protection," he needed a nonmanagement "witness in case something happened." At that, Goldsmith said that if Hathorn thought her work was not good, she wanted to be transferred. The matter was then tabled. Hathorn testified that he wanted somebody to "verify" that he had "talked to her about . . . the condition of the department" in order "to protect [himself] against any

unfair labor practice charges." He added: "If there were charges that would be brought up, I was going to bring four people back . . . and they would go through the department with me to verify what the department looks like and that I have not harassed" Goldsmith. Since there is no evidence that Hathorn normally subjected employees to the presence of "witnesses" to discussions of work, it is clear that he was subjecting her to a discriminatory working condition because of her testimony at the earlier trial.

The record leaves no doubt that immediately after the first trial Respondent embarked on a persistent course of discrimination against Goldsmith, with regard to wages and

working conditions in retaliation for her testimony and was designed to prevent any further employee recourse to the Board. As such, it was clearly violative of Section 8(a)(4) and (1) of the Act.

(3) Fred Pumilio

Pumilio, who has worked at the Herkimer store for over 6 years, testified that, before the first trial, Hathorn spent little time in the home center, "because Mr. Bifora was our boss" and Hathorn was called in only if there were problems. However, after the hearing Hathorn and Korcz both spent more time than before in the home center and the adjacent automotives department, where Klimacek worked. Nicolette, a witness for Respondent, testified that the home center "doesn't require a lot of

supervision from the store manager so on any given day, he might come back to the Home Center once during the day and browse around," but beginning in mid-March, Korcz visited the Herkimer store more than he had previously and spent time "[w]alking around looking at things talking to people" while Pumilio was in the store. According to Pumilio and Klimacek, Hathorn took notes while observing this area, which he had never previously been seen to do.

Pumilio testified that on the evening of March 24 Goldsmith gave him some union books for distribution among the employees. He placed them in a manila envelope, which he then put in his filing cabinet. The envelope was a used one ready to be discarded. The next

evening he placed the books on a table in the front cafeteria. As he was leaving, he passed supervisor Madison, who thereupon paged Hathorn.66/ Later that evening, Hathorn spent an hour or more in the home center watching Pumilio. The next morning, Pumilio was called to the front office, where, in the presence of about four office employees and Hathorn, Korcz displayed the envelope full of union books and said that "[p]assing out union books and storing them in Company equipment" was "against store policy." Korcz rejected Pumilio's claim that he had not acted "on store time," stating

66/ Hathorn later conversed with employee James Grates. Pumilio testified that Grates later reported that Hathorn had asked Grates if he was being harassed about the Union or bothered in any way by Pumilio. This heresay testimony was received without objection.

that Hathorn had checked the lounge both at lunchtime and during Pumilio's break and the books had not been there then. Korcz then handed Pumilio a previously written warning slip for "[d]istributing union handbooks on company time and using company equipment to store such matters." Korcz accused Pumilio of "harassing the people in the store" and "walking around not doing [his] job." Korcz directed Pumilio henceforth to stay in the home center. According to Pumilio, during this meeting, Korcz spoke in a loud voice and, contrary to usual practice, the office door was kept open, so other employees could hear what was going on.

Although Korcz testified that he could not recall "restrict[ing] Pumilio's movement in the store," I

credit Pumilio's testimony that Korcz told him henceforth to remain in his department. And, despite Korcz' testimony that he spoke in his "normal tone of voice," I credit Pumilio's statement that Korcz spoke in a "high-pitched" tone which could be heard by employees outside the office.67/

Respondent maintains that the General Counsel waived any claim that the warning slip given to Pumilio was discriminatory because the Board's brief in the Second Circuit (on the appeal from Judge McCurn's denial of a Section 10(j) injunction) states, in Respondent's words, that the Regional Director "is not appealing the finding . . . that there

67/ The encounter occurred before the store was open for business, so that, as Pumilio indicated, no customers could have heard it.

was no reasonable cause to believe that Nichols maintained rules barring solicitation and distribution of union literature in order to prohibit and/or discourage . . . union activities [or] the finding of no reasonable cause to believe that Korcz had wrongfully issued a warning to Pumilio in enforcement of this allegedly discriminatory rule." Before me, the parties stipulated that the General Counsel did expressly exclude certain allegations of the complaint from the appeal in the injunction action. However, the stipulation is garbled in the transcript and it is impossible to say whether Respondent's statement of the exclusions is correct. In any event, there are many possible reasons other than an "admission" for not appealing

specific portions of an adverse decision. The issues and decisional standards in Section 10(j) and Section 10(a)--(f) proceedings are different. The General Counsel is fully within his legal rights in now attacking the warning given Pumilio.

It is at least doubtful whether merely placing literature on a table in the cafeteria would constitute "distribution." In any event, as previously held, the no-distribution rule was invalid. And it was discriminatorily applied to Pumilio. His "distribution" could not have taken more than a few seconds from his work, since it occurred near the office, where he had gone in the course of business. It is clear that employees are permitted to conduct

personal business, such as making purchases, and engage in personal conversations during working time. Nor did Respondent establish the existence of any restriction on employees' keeping personal property in company-provided file cabinets.68/ And the manila envelope had no further utility to Respondent.

Respondent would justify Korcz' angrily reprimanding Pumilio within earshot of other employees by his "falsely" denying having distributed

---

68/ The employee handbook does day: "Check purse and valuables at the office. No personal belongings (this includes cosmetic-bags) are to be taken onto the sales floor. All packages brought into the store should be OK'd and checked at the store office." Respondent does not rely on, or even mention, that rule, which, in any event, would undoubtedly be invalid as applied to statutorily protected distribution.

union literature on company time. But the written warning and oral reprimand were not for untruthfulness. Manifestly Korcz' anger stemmed not from any untruthfulness or abuse of working time, but from the union orientation of Pumilio's conduct. The message could not have been lost on any employees who overhead.

Respondent further argues that Korcz would have been justified in restricting Pumilio's movement because Pumilio himself revealed that, as known to management, he had engaged in fairly extended conversations with employees Grates and Dave Marconi during working time. The evidence shows that Hathorn joined the conversations. Pumilio had never before been reprimanded. Neither

Hathorn nor Bifora, Pumilio's supervisor,[69] testified that he neglected his work in favor of chatting with fellow employees.

On Friday, March 28, Respondent included in the employees' pay a separate envelope indicating the amount the union dues would probably be. Pumilio objected and told Hathorn that he would file charges if he received another such envelope. Shortly thereafter Korcz and Hathorn went to the home center, where Korcz loudly said that "it was his business and he could do what he wants; adding that Pumilio was to stay in his work area, away from other employees, and "to leave the rest of the employees alone and not to harass" them. Respondent

---

[69] Bifora did not testify in the District Court.

would justify its conduct because Pumilio threatened to file a charge for employer conduct which the Board has held to be permissible. Allison-Haney, Inc., 185 NLRB 852 (1970). But it is well established that an employee must have full and ready access to the Board even though his view of the law may be incorrect. Acme Paper Box Co., 201 NLRB 240, 246 (1973). It does not appear that Korcz told Pumilio (or even that Korcz knew) that the Board had held such action to be permissible. Instead, he took the opportunity to express his anger within the hearing of other employees. Such conduct would naturally tend to discourage employees from exercising their statutory rights.

And, as discussed above, Brecker subjected Pumilio, along with Klimacek and Goldsmith, to ridicule and embarrassment at the general employee meeting on June 5.

As in the cases of Goldsmith and Klimacek, the record show that Pumilio was made the object of discriminatory action after he testified in the first complaint trial. There can be no doubt that Respondent's conduct was a response to Pumilio's testimony and would tend to discourage employees from engaging in union activities and/or resorting to the Board for protection of their statutory rights.

Conclusions of Law

1. S. E. Nichols, Inc., is an employer engaged in commerce or industry affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Retail Store Employees Union Local No. 1 (including former Local No. 345), United Food and Commercial Workers International Union, AFL-CIO, is a labor organization withi. he meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by: promulgating, maintaining and enforcing improper rules restricting solicitation on behalf of a union and distribution of union literature; discriminatorily restricting solicitation and distribution on behalf of a union; telling employees that other

employees have been discharged or disciplined for solicitation or distribution on behalf of a union; soliciting employees to withdraw union authorization cards; threatening store closure, loss of benefits, loss of employment and increased work duties if employees choose to be represented by a union; interrogating employees concerning their anticipated testimony in a Board proceeding; advising employees that they need not cooperate with the Board in its investigations; offering employees the assistance of Respondent's representatives and counsel in connection with Board investigations; soliciting employees to report to Respondent concerning union and protected concerted activities of other employees; soliciting

employees grievances or complaints, with express or implied promises to remedy them; promising bonuses or other benefits; informing employees that Respondent will learn the identity of employees signing union authorization cards; coercively advising employees not to sign union authorization cards; informing employees that wage increases are being withheld because of a union organizing campaign; telling employees that an employee was discharged for engaging in protected concerted activities.

4. Respondent has violated Sections 8(a)(3) and (1) of the Act by discharging Dorothy C. Reinhardt, Douglas Vincent, Kristin Burkle and Denise Styles, and failing and refusing to offer

them reinstatement, because those employees engaged in union activities and in order to discourage membership in and support of the Union.

5. Respondent has violated Section 8(a)(3), (4) and (1) of the Act by giving employees Fred Pumilio and June E. Klimacek written warnings, by withholding a wage increase from employee Margaret Goldsmith, and by subjecting those three employees to increased supervision and unfavorable working conditions because they testified on behalf of the General Counsel in a Board proceeding and/or because they supported the Union, in order to discourage employee resort to the Board and to discourage membership in and support of the Union.

6. The unfair labor practices found above have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend the customary cease-and-desist and notice-posting remedies. Because of the nature and extent of Respondent's unfair labor practices, as found in the present, as well as past, proceedings, I shall recommend issuance of a broad cease-and-desist order. St. Francis Hospital, 252 NLRB No. 174, slip. op. p. 2, n. 3 (1980).

Additionally, having found that Dorothy C. Reinhardt, Douglas Vincent, Kristin Burkle and Denise Styles were

discriminatorily discharged, I shall recommend that Respondent be required to offer them immediate and full reinstatement to their former jobs or, if any such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Respondent maintains that Burkle and Styles should not be reinstated because they "planned a disruptive walkout for the Labor Day weekend" because of Hathorn's posted schedule changes. There is no question that these employees were engaged in protected concerted activity. See S. L. Industries, Inc., 252 NLRB 253, JD slip op. pp. 10-13 (1980), involving a brief walkout, without prior notice, to protest anticipated schedule changes and the

discharge of a supervisor. The timing of the proposed walkout would not render it unprotected. M & M Bakeries, 121 NLRB 1596 (1958), enfd., 271 F.2d 602 (C.A. 1, 1959). Respondent will also be required to make the discharges whole for earnings lost by reason of their discharges. Additionally, having found that Margaret Goldsmith was discriminatorily denied a wage increase, I shall recommend that Respondent be required to grant her one and compensate her for the loss she has suffered by reason of the withholding of such increase since the date of the first increase granted to any Herkimer employee in April or May 1980. The amount of such increase shall be not less than 15 cents per hour, the amount granted to some 8 other employees in April or May 1980.

Since it appears that some employees received larger raises and Goldsmith claimed she had been promised an increase around August 1979, when her duties had been increased, a larger amount than 15 cents per hour and/or a period beginning earlier than April or May 1980 may be established if the Regional Director decides to institute a supplemental backpay proceeding. Backpay shall be computed in accordance with the formula prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest computed in accordance with Florida Steel Corporation, 231 NLRB 651 (1977). See generally Isis Plumbing & Heating Co., 138 NLRB 716 (1962). Additionally, Respondent will be ordered to remove from its records and destroy the written

warnings given to Fred Pumilio and June E. Klimacek on March 26 and April 7, 1980, respectively, and to expunge from its records any reference to such warnings.

Respondent will also be required to rescind its no-solicitation and no-distribution rules, which appear in its employee handbook. As set forth above, the employee handbook also includes a lengthy section purporting to advise employee concerning their "rights" in connection with union organizing campaigns. Contending that that portion of the handbook "is fraught with illegal language," the General Counsel requests that Respondent be required to revise the handbook and, specifically, to "excise" the section entitled "Employee Rights &

Unions--Your Employee Rights under a Union Organization Drive." Normally, I should be reluctant to recommend prohibition of any statement other than those specifically found to violate the Act. On the other hand, requiring deletion or revision of specific paragraphs, sentences, phrases or words might constitute "censorship" more restrictive of free speech then would requiring excision of an entire section. In the present case, elimination of specific offending statements would be virtually impossible, since the tenor of the entire section, read as a whole, is coercive. For example, the section begins as follows:

> Dear Employees:
>
> Now that you know what is expected of you and what your privileges are as employees of the

> S. E. Nichols Company, we want you to be aware of one more benefit your company gives you.
>
> We will protect all of our employees from being exploited or taken advantage of by outsiders . . . .
>
> The most frequent seller and exploiter of our employees will be various Union Organizers who will try to sell their organizations to our employees through various means, and will always try to sell the idea that they are fighting your battles for you against your "bad" employers.

Respondent's aim to give employees the "benefit" of "protection" from union, both at work and at home, is repeated:

> In conclusion, remember the following:
>
> 1. You are never alone--Your company will protect you.
>
> 2. Do not be threatened by anyone. Your company will protect you.

* * *

> 7. No one can force his way into your home if you do not wish him to see someone. Tell him to go. If he does not, call the Police. Your company will protect you.

Just as the law of libel takes into account innuendo to flesh out words used, in determining whether statements are coercive, it is necessary to consider them as a whole and in the context of surrounding circumstances. Respondent gives the handbook to all new employees, thereby gratuitously instilling a fear of unionization and Respondent's predictable reaction thereto. The union organization section thus of necessity tends to intimidate employees to reject exploration of their statutory rights. On balance, being fully aware of employers' free speech rights, I agree

with the General Counsel's connection that the section of the employee handbook under discussion must be withdrawn.

The General Counsel contends that Respondent's misconduct at the Herkimer store, particularly when appraised in the light of its extensive history of similar misconduct in other stores, requires extensive additional provisions. I agree that "the egregious facts of [this] case involving a recidivist employer" require extraordinary broad remedies. United Dairy Farmers Coop. Assn. v. N.L.R.B. F.2d , 105 LRRM 3034, 3041 (C.A. 3, 1980). "Obviously, the discharge of a leading union advocate is a most effective method for undermining a union organizational effort." N.L.R.B. v.

Longhorn Transfer Service, Inc., 346 F.2d 1003 (C.A. 5, 1965); Pay'N Save Corporation, 247 NLRB No. 184, slip op. p. 4 (1980). Here all the union instigators were discharged immediately upon the initiation of the organizational campaign and Respondent has been found guilty of similar misconduct in the past.70/ Respondent has previously been found to have engaged in virtually every

---

70/ In addition to the present case, involving four discriminatory discharges, orders have been issued for offers of reinstatement and backpay to at least 26 other Nichols employees: 4 at Dover, Delaware (159 NLRB 1071, 165 NLRB 924, 167 NLRB 832); 1 at Shillington, Pennsylvania (195 NLRB 189); 2 at New Philadelphia (195 NLRB 939); 10 at Marcy Utica, New York (229 NLRB 75); 9 at Matawan, New Jersey (Cases 22-CA-8465, 8646 and 9100). Respondent was held in contempt of the reinstatement and backpay order as to 2 employees of the New Philadelphia store (100 LRRM 2840 and 2762).

type of unfair labor practice found in this case. All conduct in opposition to union organization has been directed from Respondent's corporate headquarters in New York City, with Brecker and Korcz conspicuously involved.

Respondent's obdurate flouting of the Act is most similar to that found in J. P. Stevens & Co., Inc., 244 NLRB No. 82 (1979). Respondent's strategy, like Stevens', has all been directed and largely executed by the corporate office. During the period of their misconduct both Brecker and Korcz have been rewarded by successive promotions, so that now Brecker is corporate president and Korcz is manager of a division embracing five stores in New York and three in Pennsylvania. The employee handbook is

distributed to employees of all stores, whether or not they have been involved in any union campaigns. As the Board said concerning another chain of retail discount stores, Respondent's history before the Board and the courts shows that it "has a labor policy in all its stores that is opposed to the policies of the Act" and "it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed to the employees by Section 7 of the Act." Heck's, Inc., 172 NLRB 2231 (1968), and 191 NLRB 886 (1971), enfd. sub nom. Food Store Employees Local 347

v. N.L.R.B., 433 F.2d 541 (C.A.D.C., 1970), and 476 F.2d 546 (C.A.D.C., 1973),71/ cert. denied, 414 U.S. 1069 (1973).

Respondent maintains that it is not in Stevens' recidivist class because it has been involved in violations at "only a half-dozen locations over a period of fourteen years." (Emphasis supplied.) So far as appears, these are the only locations at which union campaigns have initiated. Respondent maintains that it should not be brought

71/ The D.C. Circuit required the imposition of remedies in addition to those prescribed by the Board. The Supreme Court, however, held that the Circuit Court had exceeded its authority and remanded the case to the Board for further consideration. 471 U.S. 1 (1974). On that remand, the Board explained its reasons, based on the procedural history, for not enlarging the remedial provisions in that specific case.

to brook unless and until a union campaign is initiated and charges are brought against it at a particular location. If the past holds any lessons, it must teach employees and unions that any attempt by Nichols' employees to exercise their freedom to make a choice contrary to Respondent's desires will be both hazardous and doomed to failure, at least without long and tortuous litigation, which, as the present case shows, may itself pose danger for the employees. The Act does not permit, let alone require, that employees be subjected to such odds, which result from the "status quo" created by Respondent's unlawful conduct.

As previously found, Respondent has accused the Board of favoring unions and furthering unionization. Respondent repeats this charge in its brief, as follows:

> Nichols believes [the requested] relief . . . has been improperly and unconstitutionally requested in order to . . . initiate and promote unionization, of Nichols' employees at the Herkimer and at other Nichols stores . . . .

It later speaks of "[t]he attempt by the Regional Director . . . to try to initiate unionization of Nichols." In a similar vein, Respondent contends that extending the notice requirements to stores in which there apparently have been no union campaigns would "chang[e] the status quo in favor of unionization rather than restoring the status quo."

The repetition of Respondent's attack on the Board's neutrality points up the need for firm preventive action, since public confidence in that neutrality is indispensible to effectuation of the congressional mandate of the Act. The remedies here recommended are not designed to promote unions or unionization; they have been reluctantly recommended because it is necessary to clear the atmosphere poisoned by respondent's unrelenting, egregious and pervasive trampling on its employees' statutory rights. The remedies have been designed for the sole purpose of assuring an atmosphere in which the employees may freely choose, without fear or favor, whether they want to make common cause, with or without a

union, in dealing with their employer. The aim is restoration of the status quo before Respondent's massive violations of the Act.

For the foregoing reasons, I shall recommend the notice and access requirements imposed in Stevens & Co., Inc., supra, 244 NLRB No. 82, with modifications appropriate to the Nichols situation.

Apparently, the same union has been involved at all the Stevens facilities. With Nichols, however, different unions have been involved at various stores. For example, at Marcy the union was Amalgamated Meat Cutters, Butcher Workmen and Affiliated Crafts of North America, AFL-CIO; at the Shillington store, the union was Retail

Clerks, Employees Union, Local 1393, Retail Clerks International Association, AFL-CIO; at New Philadelphia, it was Retail Clerks International Association, Local 698, AFL-CIO; and the present charging party is Retail Stores Employees Union Local No. 345 (into which Local No. 1 has merged), United Food and Commercial Workers Union, AFL-CIO. Because of the blanket nature of Respondent's unlawful resistance to any unionization, proclaimed in the system-wide handbook, there is no apparent reason to limit protection to activities by or on behalf of the particular local union involved at the Herkimer store. To confine the remedy in that manner would invite unnecessary repetition of litigation like the present. I shall therefore recommend

that the remedial provisions inure to the benefit of any labor organization which may seek to organize employees at any of Respondent's stores.72/

In Stevens, 244 NLRB No. 82, the Board required that written instructions be given to supervisors only at the specific facilities there involved. While only the Herkimer store was directly involved in the present case, the record establishes that Herkimer is only some 13 miles from Utica, where Respondent operates two other stores--Marcy and New Hartford. All three stores are within company

---

72/ There is no evidence of any interunion disputes or rivalries in connection with any of the past Nichols campaigns. Should any presently unforeseen problems arise in the future, the Board will be available to take appropriate action.

division supervised by Korcz. The recent union campaign at the Marcy store was frequently referred to in the Herkimer campaign, with Respondent indicating its approval and continuation of such tactics at Herkimer. Lintz, an antiunion veteran of the Marcy campaign, was employed at the Herkimer store and pursued antiunion activities during its campaign.73/ Thus, the situation is such that events at one of the three stores will inevitably be known to and affect the conduct of the employees of all three. Accordingly, I recommend that Respondent be required to give written instructions concerning union organizing campaigns to all supervisors at the Herkimer, Marcy and New Hartford store.

73/ The same is apparently true of employee Cornaccio.

In Stevens the Board required that union representatives be granted reasonable access to nonworking areas of the Company's premises for communication with employees during their nonworking time. However, in other cases such access has not been required. See, e.g., Heck's, Inc., supra, 191 NLRB at 887. The evidence in the present case indicates that employees frequently work irregular hours, with no defined "shifts." Also, it appears that employee lunch and other breaks vary widely. Thus, in order to communicate with all employees, it would be necessary for union representatives to be present virtually all the time a store was open. Balancing the employees' need for full information and Respondent's right to

control its own property, I reject the General Counsel's request for such an access requirement.

Respondent objects to being required to give unions access to company bulletin boards because there is no evidence that Respondent has used bulletin boards in its antiunion campaigns. But Respondent has distributed its employee handbook to all employees and has continuously available convenient, inexpensive means of communicating with its employees. Since Respondent has improperly used its available arenas of communication unlawfully, it is appropriate to provide the unions concerned "effective vehicles for making a substantive presentation of the fact that unions can be useful and

effective, a fact which Respondent has improperly sought to throw into doubt by engaging in unlawful conduct" at stores where there has been organizational activity. J. P. Stevens & Co., Inc., 239 NLRB 738, 771 (1978). Reasonable access by a union to company bulletin boards and other places where notices to employees are posted in a moderate measure, having minimal risk of interference with Respondent's operations.

In line with J. P. Stevens & Co., Inc., supra, 244 NLRB No. 82, I shall recommend having the prescribed notice and accompanying letter read at meetings called for that purpose in all Nichols stores. Because the Herkimer and other campaigns have been directed and largely executed by Brecker and Korcz, I

shall require that the notice be signed by both, as well as by the manager of each store in which it is read. In Stevens, loc. cit., the company was given the option of having the notice read to the employees by a Board agent rather than by a company official. Respondent objects to the absence of such options from the remedies requested by the General Counsel. Brecker was a stellar performer in the Herkimer campaign. Despite that fact, he failed to testify, thus apparently attempting to disassociate himself from the Company's conduct. It is essential that unequivocal assurance be given the employees that Brecker, the director and perpetrator of the wrongs, assumes responsibility for remedial action and it

will not be left to lower echelon management. In furtherance of this consideration, I shall also recommend that all supervisors be required to attend any meetings in their stores when the notice is read to employees. As Brecker's comrade in arms, Korcz will also be required to attend the meetings.

In Stevens, 244 NLRB No. 82, the Board required Respondent to reimburse the Union for its organizational costs and the Board for its litigation expenses. However, no such remedies have been requested in the present case. In the absence of any such request, I shall not recommend inclusion of such provisions in the present order.

Upon the foregoing findings and conclusions, and the entire record in this consolidated proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:74/

ORDER

Respondent, S. E. Nichols, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

74/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Threatening closure of any stores, loss of employment, loss of benefits or increased work duties if the employees choose to be represented by a labor organization.

(b) Soliciting employee complaints and grievances and expressly or impliedly promising to remedy them.

(c) Promising employees any wage increase, bonus or other benefit to discourage membership in or support of any labor organization.

(d) Expressly or impliedly soliciting employees to withdraw or retract their authorizations for union representation.

(e) Coercively advising employees not to sign union authorization cards.

(f) Telling any employee that Respondent or its counsel would learn the identity of employees who signed union cards.

(g) Telling employees that discriminatorily discharged employees had not been and would not be reinstated or that any such employees who are reinstated do not or will not remain in Respondent's employ.

(h) Promulgating, maintaining or enforcing any rule prohibiting employees from soliciting on behalf of any labor organization in nonpublic areas of Respondent's premises in nonwork time.

(i) Promulgating, maintaining or enforcing any rule prohibiting employees from distributing written or printed material in support of any labor

organization in nonpublic nonwork areas of Respondent's premises during nonwork time.

(j) Imposing or enforcing any restriction or limitation on solicitation and distribution of any employee on behalf of any labor organization greater than restriction on solicitation or distribution by employees for any other purpose.

(k) Expressly or impliedly soliciting employees to inform Respondent of the union or other protected concerted activities of other employees.

(l) Keeping in effect and/or distributing its employee handbook (or any past or future version thereof) so long as it contains its present rules concerning solicitation and distribution

or the section entitled "Employee Rights & Unions--your Employee Rights and Legal Rights under a Union Organization Drive."

(m) Expressing approval of and threatening to engage in conduct similar to that which has previously been found to violate the Act.

(n) Expressly or impliedly discouraging employees from resorting to or cooperating with the Board in its investigations and/or proceedings under the Act.

(o) Offering the assistance of Respondent's representatives or counsel in connection with Board investigations or proceedings.

(p) Questioning employees concerning their protected testimony in a Board proceeding.

(q) withholding wage increases from any employees because they have testified on behalf of the General Counsel in a Board proceeding or because they support a labor organization.

(r) Discharging, reprimanding, disciplining, subjecting to embarrassment, ridicule or increased supervision, or otherwise discriminating against any employees because they have testified in any Board proceeding, have been named in any unfair labor practice charges or complaints, or because they support or have supported any labor organization or have engaged in protected concerted activities.

(s) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Offer Dorothy S. Reinhardt, Douglas Vincent, Kristin Burkle and Denise Styles immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and previously enjoyed.

(b) Grant Margaret Goldsmith a wage increase of not less than 15 cents per hour.

(c) Make all of the employees whole for any loss of pay they have suffered by reason of Respondent's discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Remove from its records and destroy any and all copies of and references to the written warnings given to employee Fred Pumilio on March 26, 1980, and employee June E. Klimacek on April 7, 1980, as well as the written statements dated March 26, 1980, by employees Rose Ceneviva and Judith Guise concerning Klimacek.

(e) Post in conspicuous places at all of its stores copies of the attached notice marked "Appendix A."75/ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed on behalf of Respondent by president Manfred Brecker, by division supervisor Henry Korcz, and by the highest managerial official of the store in which the notice is posted, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all

---

75/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Reproduce and mail to the home of each of its employees at all of its stores a facsimile of the aforesaid signed notice, together with a letter appended hereto as "Appendix B." Said letter shall be reproduced on the Company's regular business stationery and signed by president Brecker and by the highest official of the recipient's store. Respondent shall provide the Regional Director for Region 3 with proof of such mailing.

(g) Reproduce and give to each supervisor at its Herkimer, Marcy and New Hartford, New York, stores a facsimile of the aforesaid notice, and give written instructions, signed by the highest official at each store, to each supervisor to comply with the provisions of the notice. Respondent shall provide the Regional Director for Region 3 with proof of compliance with this paragraph.

(h) At such reasonable time after the entry of this Order as the Board may request, convene during working time all its employees and supervisors in each of its stores, and have the notice read by president Manfred Brecker. The Board shall be afforded a reasonable

opportunity to provide for the attendance of a Board agent at all meetings held pursuant hereto.

(i) Upon request of a union, made within 2 years from the date hereof, immediately grant such union and its representatives reasonable access to the store bulletin boards and all places where notices to employees are customarily posted, at each of Respondent's stores, for a period of 1 year from the date of request.

(j) In the event that during a period of 2 years following entry of this Order any supervisor or agent of Respondent convenes any group of employees at any of Respondent's stores and addresses them on the question of union representation, give notice thereof

to any union attempting to organize the employees and afford two union representatives a reasonable opportunity to be present at such speech and, upon request of said representatives, permit one of them to address the employees for the same amount of time as Respondent's address.

(k) If, within the next 2 years, the Board schedules an election at any of Respondent's stores, then, upon request by any participating union, afford at least two representatives of such union reasonable access to each of Respondent's said stores and appropriate facilities to deliver a 30-minute speech to employees on working time, the date

thereof to be within 10 working days before but not within 48 hours prior to any such election.

(l) Upon request of a union immediately furnish it with lists of the names, addresses, and classifications of all of Respondent's employees at any store where the Union is conducting an organizing campaign, as of the latest available payroll date, and furnish a corrected, current list to such union at the end of each 6 months thereafter during the 2-year period referred to above.

(m) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what

steps Respondent has taken to comply herewith.

Dated, Washington, D.C.

December 31, 1980

Josephine H. Klein
Administrative Law Judge

APPENDIX A

NOTICE TO

EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE

UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN DECIDED THAT WE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

The National Labor Relations Act gives all employees these rights:

APPENDIX A (CONTINUED)

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective-bargaining or other aid or protection

To refrain from any or all these things.

Our employees are free to become and remain members of LOCAL NO. 1, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

APPENDIX A (CONTINUED)

WE WILL NOT interfere with or impede the investigative or other processes of the National Labor Relations Board.

WE WILL NOT discourage employees from cooperating with any lawful investigation or proceeding conducted by Board agents.

WE WILL NOT question any employee as to testimony they expect or intend to give at any hearing before the National Labor Relations Board.

WE WILL NOT solicit employees to withdraw or retract authorizations for union

APPENDIX A (CONTINUED)

representation or applications for union membership which they have executed.

WE WILL NOT solicit your grievances or complaints and expressly or impliedly promise to adjust them in order to interfere with your union activities.

WE WILL NOT tell employees that wage increases have been, are being, or will be withheld because of their union activities or because of a pending union election campaign.

WE WILL NOT promise any wage increases, bonus or other benefits in order to discourage you from seeking union representation.

APPENDIX A (CONTINUED)

WE WILL NOT direct you or coercively advise you not to sign union authorization cards or any papers other than pay receipts.

WE WILL NOT threaten our employees with store closure, loss of employment, reduction in benefits or increased work requirements if they choose to be represented by a union.

WE WILL NOT restrict your right to solicit or to distribute written or printed material on behalf of any labor organization on nonworking time in nonpublic, nonworking areas of our premises.

APPENDIX A (CONTINUED)

WE WILL NOT impose any greater restriction on the solicitation or distribution or receipt of written or printed material on behalf of a union than is imposed on all other forms of solicitation for distribution and receipt of material.

WE WILL NOT ask or solicit any employees to report to or inform us of the union and/or protected concerted activities of other employees.

WE WILL NOT indicate to you that we approve of or will repeat any type of conduct by which the

APPENDIX A (CONTINUED)

Board has determined that we have previously violated the National Labor Relations Act.

WE WILL NOT discriminate against any employees because they have engaged in union or protected concerted activities or because they have testified in National Labor Relations Board hearings or have been named in any charge or complaint before the Board, or to discourage membership in or support of any labor organization. Specifically, WE WILL NOT discriminate against any such employees by discharging them; reprimanding, warning, or disciplining them; withholding

APPENDIX A (CONTINUED)

wage increases from them; subjecting them to increased supervision; subjecting them to ridicule or embarrassment; or in any other manner.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights to self-organization, to form, join or assist LOCAL NO. 1, UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

WE WILL offer DOROTHY C. REINHARDT, DOUGLAS VINCENT, DENISE STYLES and KRISTIN BURKLE immediate and full reinstatement

APPENDIX A (CONTINUED)

to their former positions, or if such positions no longer exist, to substantially equivalent positions. WE WILL pay each of these four employees for any earnings they lost as a result of our discrimination against them, with interest.

WE WILL give MARGARET GOLDSMITH a wage increase and pay her, with interest, for any loss she suffered as a result of our having previously withheld a wage increase from her.

WE WILL remove from our records and destroy all copies of and references to written warnings

APPENDIX A (CONTINUED)

given to FRED PUMILIO and JUNE E. KLIMACEK on March 26, and April 7, 1980, respectively.

WE HEREBY rescind and withdraw from our employee handbook the section headed "Employee Rights & Unions--Your Employee Rights and Legal Rights under a Union Organization Drive" and the rules concerning employee solicitation and distribution of literature.

WE WILL withdraw our employee handbook from distribution and circulation until such time as the portions referred to above have been physically deleted.

APPENDIX A (CONTINUED)

WE WILL give all our supervisors at our Herkimer, Marcy and New Hartford, New York, stores copies of this notice and instruct them to comply with its provisions.

WE WILL grant to any union access to our bulletin boards, lists of the names and addresses of our employees and, as ordered, speaking opportunities at any store at which the requesting union is attempting to organize our employees.

WE WILL send to all our employees copies of this notice, with an explanatory letter; WE WILL read this notice to all our

APPENDIX A (CONTINUED)

employees; and WE WILL reproduce this notice and explanatory letter in appropriate company publications.

WE WILL publish this notice in newspapers of general circulation in Herkimer and Utica, New York.

S. E. NICHOLS, INC.
(Employer)

Dated _____ By _____
Manfred Brecker
(President)

Dated _____ By _____
Henry Korcz
(Division Manager)

Dated _____ By _____
(Store Manager)

APPENDIX A (CONTINUED)

THIS IS AN OFFICIAL NOTICE AND

MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Federal Building - Rm. 901
111 - W. Huron Street,
Buffalo, NY 14202
Telephone (716) 437-4951.

APPENDIX B

Dear Nichols Employees:

Pursuant to an order of the National Labor Relations Board, this letter and enclosed notice are being sent to all Nichols employees to assure you that your rights as employees under the National Labor Relations Act will be honored and protected.

The National Labor Relations Board that found that, since 1965, we have violated the rights of our employees in the course of union organizing campaigns in our stores in Dover, Delaware, Shillington, Pennsylvania; New Philadelphia, Ohio; Elmira, New York; and Marcy (Utica), New York. When these decisions by the National Labor Relations Board have been appealed, the United

States Circuit Courts of Appeals have affirmed them. We have also been held in contempt of court for violating such orders at our New Philadelphia, Ohio, and Shillington, Pennsylvania, stores. In addition to the cases referred to above, on our settlement agreements, orders have been issued against us for our conduct in connection with a union campaign at our store in Matawan, New Jersey. Most recently it has been held that we violated the National Labor Relations Act in a union organizing campaign at our store in Herkimer, New York.

The Board has held that, in large part, our campaigns have followed much the same general pattern in all union organizational campaigns. That

pattern, as reflected in the enclosed notice, includes, among other things, discharge of employees who attempt to unionize; discrimination in various ways against employees who support a union or who cooperate with the National Labor Relations Board in investigating and prosecuting cases against us; threats of detriment to employees who choose to be represented by a union; promises of benefits to discourage employees from choosing union representation; restriction of employees' legal rights to solicit for and distribute literature on behalf of unions.

In the Herkimer case, it has been found that we have interfered with investigations by the National Labor

Relations Board and that we have improperly led our employees to believe that the Board is interested in supporting unions but is unable and unwilling to protect the rights of employees under the Act. We hereby disavow any such statements and implications. We recognize that the Board is open and freely accessible to all persons who believe that any violation of the National Labor Relations Act has been committed, and that the Board will, to the best of its ability, exercise its authority and fulfill its obligations to protect the rights of all persons under the Act.

We shall, of course, feel free to exercise our right to free speech concerning union matters. However, we assure you that we will make every possible and sincere attempt to keep our conduct within proper bounds. We want you to know that you are entirely free to consult the National Labor Relations Board if at any time you believe we may have violated your rights under the National Labor Relations Act. We will not inquire about or otherwise interfere with any contacts, direct or indirect, you may have with the Board.

Very truly yours,

Manfred Brecker,
President

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD DePROSPERO

vs

S.E. NICHOLS

TRANSCRIPT OF DECISION OF HON. NEAL P. McCURN, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK, in the above-entitled matter on the 8th day of July 1980 at the U.S. Courthouse, Utica, New York.

APPEARANCES:

THOMAS J. SHERIDAN, ESQ.
Attorney for National Labor
Relations Board

GOLENBOCK & BARELL, ESQS.
Attorneys for Respondents,
BY: STEVEN RATHKOPF and
ROBERT GOODMAN, ESQS.

THE COURT: All right. This will constitute the findings of fact and conclusions of law in this matter.

This cause has come on to be heard upon the verified petition of the active regional director of the Third Region of the National Labor Relations Board for a Temporary Injunction pursuant to Section 10J of the National Labor Relations Act, pending the final disposition of the matters involved herein pending before the Board, and upon the issuance of an Order to Show Cause why injunctive relief should not be granted as prayed in said petition.

Respondent has filed an Answer to the petition, and a hearing on the issues raised by petition and Answer has been held in this Court over the past several

days last week and this week. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence bearing on the issues and to argue on the evidence and the law, and the Court has also considered the memorandums of law and the facts that were prepared by counsel on both sides.

Upon the entire record, the Court makes the following findings of fact:

1. That petitioner is acting regional director of the Third Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10J of the Act.

3. On or about September 7, 1979, the retail store employees union, Local 345, United Food and Commercial Workers, AFL-CIO in Case 3-CA-9304, pursuant to provisions of the Act, filed with the Board, charges alleging that S. E. Nichols, Inc., the respondent, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)1 and -3 of the Act.

4. On or about October 10, 1979, upon said charge, the general counsel of the Board on behalf of the Board by petitioner, issued a complaint and Notice of Hearing pursuant to Section 10B of the Act alleging that the respondent has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)1 and -3 of the Act. Based

upon said charge, petitioner, pursuant to Section 10B of the Act on March 5, 1980, issued an amendment to Complaint and Notice of Hearing.

5. On March 17, 1980, a hearing was held before Administrative Law Judge Josephine H. Klein of the Board. Said hearing closed on March 19, 1980. At said hearing, respondent's employees Fred Pumilio, Margaret Goldsmith and June Klimacek gave testimony on behalf of the general counsel of the Board.

6. On or about April 7, 1980, Local Number 1, United Food and Commercial Workers, AFL-CIO in Case 3-CA-9714, pursuant to the provisions of the Act, filed with the Board, charges alleging the respondent has engaged in and is engaging in unfair labor practices

within the meaning of Section 8(a)1, -3 and -4 of the Act.

7. On or about May 8, 1980, upon said charges, the general counsel and the Board, on behalf of the Board by petitioner, issued a Complaint and Notice of Hearing pursuant to Section 10B of the Act, alleging that respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)1, -3 and -4 of the Act and scheduled a hearing on said allegations for November 13, 1980 or earlier if deemed appropriate. Based upon said charge, petitioner, pursuant to Section 10B of the Act, on June 11, 1980, issued an amendment to the Complaint and Notice of Hearing. On May 12, 1980, counsel for the General Counsel of the Board filed a

motion to reopen the hearing in Case 3-CA-9304 on consolidate with Case 3-CA-9714 and to adduce additional evidence. On May 20, 1980, Judge Klein issued an Order to Show Cause why this motion should not be granted.

8. Respondent S. E. Nichols is a New York corporation engaged in the business of owning and operating self-service discount retail department stores, including a store at Middleville Road and Route 28, Herkimer, New York.

9. The store received gross revenue in excess of $500,000 in the preceding twelve months, and during the same period, it received goods in excess of $50,000 which was transported there in interstate commerce in states other than New York.

10. Nichols is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2, 6 and 7 of the Act.

11. Fred Pumilio, Margaret Goldsmith and June Klimacek are employees of Nichols at the store.

12. Pumilio has been employed with the store for approximately six years. He is employed in the home center section of the store.

13. Goldsmith has been employed at the store for approximately two and a half years. Since August 1979, she has been employed in the toy department.

14. Klimacek has been employed at the store since August 1977. She is employed in the automotive department.

15. The store is a one-level store of approximately 100,000 square feet at which Nichols employs currently about 70 people.

16. The chief Nichols employee at the store is the store manager who has general supervisory authority with respect to the day-to-day operations of the store. The store manager at the store is Robert Hathorn. He commenced his duties there on August 20, 1979.

17. Above the store level there are employees in what is known as the district level. There is a district supervisor who has responsibility for administering company policy with respect to several stores. Henry Korcz is the district supervisor for eight stores,

including the store at Herkimer, New York.

18. Korcz regularly visits the stores in his district.

19. President of Nichols is Mr. Manfred Brecker who has been the president at all times relevant to this action.

20. Pursuant to subpoenas served by the N.L.R.B., Pumilio, Goldsmith and Klimacek all testified as witnesses on March 18, 1980 in behalf of the N.L.R.B. at a hearing before an administrative law judge of the N.L.R.B. in Case 3-CA-9304. Case 3-CA-9304 alleged unfair labor practices by Nichols in respect of certain former employees at the store.

21. Nichols did not, as charged in the Complaint, interrogate its

employees on March 7th or 10th, 1980 regarding testimony to be given in N.L.R.B. Case 3-CA-9304.

22. Since the hearing in Case 3-CA-9304, Nichols has not discriminated against its employees at the store because said employees gave testimony under the Act in that case or otherwise participated in the N.L.R.B. process.

23. Hathorn and Korcz have not harassed Klimacek in her employment by closely watching and monitoring her job duties contrary to past practice. It is part of the normal and regular duty and practice of Hathorn and Korcz to watch and monitor employee performance of job duties at the store. Hathorn and Korcz did not watch or monitor Klimacek's job

duties after the hearing in Case 3-CA-9304 more than they have prior thereto.

24. On March 26, 1980, Korcz did not discriminatorily reprimand Klimacek for not wearing a smock. It is company policy that female employees are to wear a smock on the sales floor at all times. This policy, it appears from the evidence, has been regularly enforced at the store both before and after the hearing in Case 3-CA-9304, and other employees have been told to put on their smocks when they had been seen without them on the sales floor.

25. Subsequent to the hearing in Case 3-CA-9304, Hathorn did not discriminatorily assign Klimacek to more onerous and arduous work duties. It was

part of her regular job duties to move cases of oil when necessary.

26. On March 27, 1980, Hathorn did not discriminatorily reprimand Klimacek for eating food in her work area contrary to past practice. The proof at the hearing was to the effect that food is not to be eaten by employees on the sales floor of the store. This policy has been regularly enforced at the store both before and after the hearing in Case 3-CA-9304.

27. On April 7, 1980, Hathorn issued a written warning to Klimacek. This warning was the result of complaints to Hathorn by store employees, Rose Ceneviva and Judith Guise. Klimacek had been previously warned in writing by Hathorn on December 8, 1979 for similar

conduct and had been verbally warned for similar conduct earlier in the fall of 1979. The April 7, 1980 warning was not discriminatory.

28. Hathorn and Korcz have not harassed Pumilio in his employment by closely watching and monitoring his job duties contrary to past practice. It is part of the normal and regular duty and practice of Hathorn and Korcz to watch and monitor employees' performance of job duties at the store. In the course of performing this duty and practice, Hathorn and Korcz walked into and through various departments in the store and they make notes during the course of these activities. This was their practice and it continued to be their practice after the hearing in Case 3-CA-9304.

29. On March 26, 1980, Korcz issued a written warning to Pumilio for distributing union handbooks on company time and using company equipment to store such matter. The no distribution rule regularly and customarily in force at the store prohibits employees from distributing literature of any kind on the sales floor or while an employee is on company time. This policy was also announced by Hathorn to the store employees prior to March 1980 in connection with any type of literature, including literature for Tupperware, Avon and Sarah Coventry. Pumilio admittedly stored literature in company property and while on company time and placed the same in the employees' lounge.

30. Hathorn and Korcz had not harassed Goldsmith in her employment by closely watching and monitoring her job duties contrary to past practice. It is part of the normal and regular duty and practice of Hathorn and Korcz to watch and monitor employee performance of job duties at the store.

31. The employer, Nichols, has not discriminatorily assigned Goldsmith to job tasks contrary to past practice and subsequent to the N.L.R.B. hearing.

32. Subsequent to the N.L.R.B. hearing, Hathorn did not discriminatorily remove merchandise from Goldsmith's work area that she had planned to purchase contrary to past practice. It is company policy that merchandise to be purchased by an employee is not to be stored under

counters or otherwise, but is instead to be taken directly to the layaway desk for safekeeping until such time as the employee desires to pay for the merchandise and remove it from the store. This policy has been regularly enforced at the store both before and after the N.L.R.B. hearing in Case 3-CA-9304.

33. The speeches of Nichols management in the period March 1980 through May 7, 1980 at the store, when taken in context, were no more than part of the usual give and take between employer and union in the course of a union election campaign. There was no threat of reprisal or force or promise of benefit.

34. The speeches by Brecker on April 2nd and 3rd and Korcz on April 18th

and 26th to store employees, to the extent they contained the words alleged by petitioner, including any criticism expressed or implied, contained no threat of force or reprisal against an employee who testifies before the N.L.R.B. or otherwise avails himself of the N.L.R.B. processes, and no promise of benefit to any employee who refrains from testifying before the N.L.R.B. or avails himself or herself of the Board's processes.

35. Brecker's speech on June 5, 1980 was an expression of views, argument and opinion by management which did not contain a threat of reprisal or force or promise of benefit within the meaning of Section 8C of the Act.

36. The management speeches did not undermine the effectiveness of the

N.L.R.B.'s processes nor interfere with the employees' rights under Section 7 of the Act. It appears that Pumilio, Goldsmith and Klimacek, both prior to and after these speeches, freely availed themselves of the processes of the N.L.R.B. and of the right to testify on its behalf and on behalf of the union, which, of course, they were entitled to do.

37. Respondent does not maintain in force and effect rules barring solicitation and distribution of union literature in order to prohibit and/or discourage its employees from engaging in union activities. The evidence on this subject was that respondent's rules as in force with respect to the distribution of all outside literature are applied

uniformly with respect to all such literature.

38. This proceeding was allegedly commenced, at least in part, to provide immediate injunctive relief so that employees of the store could not be inhibited from participating in the election process regarding the June 18, 1980 representation election at the store, so that the Board not be hindered in performing its responsibilities in respect to the conduct of such election, and so that the Board would not be hindered in investigating possible future election objections raised concerning conduct affecting the result of the election. The election was held on June 18, 1980. The employees voted forty-seven to nine against having the

union. No objections were raised by the union concerning conduct affecting the result of the election, and the deadline for filing such objections expired on June 23, 1980. (29 CFR, Section 102.69.)

The petitioner has certified the election result as final. There are, therefore, no objections to investigate and no claim by the N.L.R.B. that it was hindered in performing its responsibilities in connection with the conduct of the election.

39. Even if the acts complained of occurred and/or were discriminatory, there will be no irreparable harm if the requested injunctive relief is denied.

40. Even if the acts complained of occurred and/or were discriminatory, there is no emergency situation which

warrants the petitioner's motion be granted. A final Order in the Board's proceedings will not be rendered meaningless by the denial of petitioner's request for injunctive relief.

41. Even if the acts complained of occurred and/or were discriminatory, there is no pattern of continued conduct which requires an injunction to preserve the status quo.

Conclusions of Law:

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding under Section 10J of the Act.

2. The petitioner did not have reasonable cause to believe that employers were interrogated about their

testimony they were to give in N.L.R.B. Case 3-CA-9304.

3. The petitioner did not have reasonable cause to believe that the conduct alleged to be in violation of Section 8(a)1 and 8(a)4 of the Act occurred, or if the acts occurred, the petitioner did not have reasonable cause to believe such acts were discriminatory and that they occurred because employees Pumilio, Klimacek and Goldsmith testified at the Board hearing in Case 3-CA-9304 or otherwise participated in Board processes.

4. The petitioner did not have reasonable cause to believe that respondent, by its speech, undermined the effectiveness of the Board's processes and interfered with employee's rights

under Section 7 of the Act. The speeches alleged by the petitioner were expressions of views, arguments or opinions which did not contain a threat of reprisal or force or promise of benefit within the meaning of Section 8C of the Act. Such speeches, as alleged, are protected by the First Amendment to the Constitution of the United States and Section 8C of the Act, and consequently, may not be used as evidence of an unfair labor practice or form the basis for a conclusion of reasonable cause. Indeed, criticism of petitioner and/or of the Board, unless accompanied by a threat of reprisal or force or promise of benefit, is protected speech under 8C of the Act and the First Amendment to the Constitution of the United States.

5. Even if the acts complained of occurred and/or were discriminatory, it would not have been just and proper to issue the requested injunctive relief. In this connection, the Court notes that a 10J injunction is a drastic remedy to be used to preserve the status quo in the face of an egregious unfair labor practice under conditions which cannot await the outcome of the Board's normal procedures and when there has been a showing that such conduct will likely be repeated or continued unless enjoined. For reasons set forth in the Court's finding of fact, this standard has not been met.

6. Petitioner has requested that this Court order respondent to remove from employee June Klimacek's file, the

April 7, 1980 warning by respondent and to remove from employee Fred Pumilio's file, the March 26, 1980 warning by respondent. For this Court to so direct respondent, it would require a final determination on the merits, which decision is within the jurisdiction of the N.L.R.B., and this Court will not assert the Board in this regard. Therefore, the relief requested by the petitioner herein is, in all respects, denied. It is so ordered.

THE CLERK: Court stands adjourned.

CERTIFICATION

I, George T. McGloine, Official Court Reporter for the United States District Court in and for the Northern District of New York, do certify this to be a true and accurate transcript of the stenographic record of the foregoing, taken at the time and place noted in the heading hereof.

George T. McGloine
Official Court Reporter
United States District Court
Northern District of New York

Albany, New York

July 10, 1980

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and

Present:

Hon. James L. Oakes,
Hon. Thomas J. Meskill,
Circuit Judges.
Hon. Henry F. Werker,
District Judge.

Filed:
Feb. 18, 1981

Richard L. De Prospero, Acting Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Appellant,

v. 80-6149

S. E. Nichols, Inc.,

Appellee.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ORDER

This appeal is from a July 8, 1980, order of the United States District Court for the Northern District of New York, Neal P. McCurn, Judge, denying the National Labor Relations Board's petition for a temporary injunction against S. E. Nichols, Inc. The petition was filed on June 13, 1980, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). The Board sought injunctive relief pending its hearing and decision in an unfair labor practices case in which a complaint had been filed on April 7, 1980, and amended complaints were filed on May 20 and June 11. The hearing of the unfair labor practice case commenced on September 15, 1980, and has been concluded, but we were advised at

oral argument that a decision by the Board might be anywhere from six months to a year away.

The unfair labor practices charged were violations of Sections 8(a)(1) and (4) of the Act, 29 U.S.C. §§ 158(a)(1) and (4), by interfering with, coercing, and restraining employees in the exercise of their right under Section 7, 29 U.S.C. § 157, to participate in Board proceedings, and by discriminating against three employees who had given testimony in an earlier unfair labor practice case against Nichols. The Board contends that there is reasonable cause for it to believe, inter alia, that Nichols threatened at an employees' meeting that it would not comply with Board orders; interrogated two employees

regarding testimony they were to give; and discriminated against those two and a third employee for having testified in an earlier unfair labor practice case, by closely monitoring their activities at work, discriminatorily enforcing rules against one, denying a routine merit raise to another and discouraging her from filing unfair labor practice charges, and ridiculing all three for filing the charges that are the basis of the underlying unfair labor practice case. The district court found that Nichols did not interfere with its employees' right to participate in Board proceedings and did not discriminate against the employees who had testified against Nichols in an earlier unfair labor practice case. It also found that

the Board did not have reasonable cause to believe that unfair labor practices had occurred, and that even if the unfair labor practices had occurred, ordering injunctive relief would not have been just and proper.

The case law in this circuit makes the issue whether a Section 10(j) injunction should be ordered turn first on whether the Board had reasonable cause to believe that unfair labor practices were committed. See Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975). Under this test, while the Board is to be given the benefit of the doubt on disputed issues of fact, id., 517 F.2d at 36-37, we agree with respondent that the court is not a rubber stamp for the allegations of a 10(j) petition, at least

where, as the Board is required to agree, "much of [the employees'] testimony was contradicted by testimony of witnesses for Nichols, so that the ultimate merits of the case may not be entirely free from doubt" (Board Brief at 27); "the Regional Director's inferences ... [are] not the only inferences which could be drawn from the evidence" even though they might be reasonable (Board Brief at 28); and the alleged violations "were not always blatant" (id. at 28), and were perhaps in some cases "apparently innocuous conduct" (id. at 29).

We need not determine, however, whether there was reasonable cause to believe that unfair labor practices were committed, for we agree with the court below that, in the statutory language, it

was not "just and proper" to issue an injunction in this instance. It is true that the Board seeks injunctive relief in the public interest rather than in vindication of purely private rights, and that the courts therefore must "act in accordance with traditional equity practice 'as conditioned by the necessities of the public interest which Congress has sought to protect.'" Seeler, 517 F.2d at 39-40. This permits the courts to award relief in order to preserve the status quo pending Board decisions and to ensure that the Board's final orders will be efficacious and its administrative procedures meaningful. See Angle v. Sacks, 382 F.2d 655, 660-61 (10th Cir. 1967); see also McCleod v. General Electric Co., 366 F.2d 847, 850 &

n.3 (2d Cir. 1966), vacated as moot, 385 U.S. 533 (1967). With these considerations in mind, however, the courts must still exercise their sound equitable discretion.

The district court may have applied too strict a standard for granting equitable relief, with its reference to "no emergency situation," and its statements that injunctive relief is a "drastic remedy" and that a prerequisite to such relief is an "egregious unfair labor practice," (although the Fifth Circuit might agree, Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192-93 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976)). And we are not completely convinced that the court considered the question whether

Nichols's alleged conduct has the continuing effect of discouraging employees from resorting to and cooperating with Board procedures. But here the election has been held and the losing union has not challenged the result, the employees who allegedly were intimidated have testified, and there was no evidence introduced to indicate that there had been further harassing conduct. The Board now has the final decision in the unfair labor practice action under advisement. Under the circumstances we believe that the denial of temporary relief pending the Board's decision was correct. Needless to say, however, nothing we say herein is in any way intended to prejudge the pending Labor

Board proceeding or any future court action brought in respect thereto.

Judgment affirmed.

/s/ James L. Oakes

/s/ Thomas J. Meskill
Circuit Judges.

/s/ Henry F. Werker
District Judge.

LIST OF PARTIES

Pursuant to Rule 28.1, Petitioner has no parent companies, affiliates or non wholly-owned subsidiaries.

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1779

In the Supreme Court of the United States

OCTOBER TERM, 1988

S.E. NICHOLS, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

24pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that, in light of petitioner's recidivist history and its extensive campaign of unfair labor practices in response to an organizational drive at one of its stores, the National Labor Relations Board did not abuse its discretion to remedy unfair labor practices by ordering certain access and notice remedies in addition to its traditional remedies.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	14
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Conair Corp. v. *NLRB*, 721 F.2d 1355 (D.C. 1983), cert. denied, 467 U.S. 1241 (1984) 17

Decatursville Sportswear Co. v. *NLRB*, 406 F.2d 886 (6th Cir. 1969) 18

Eisenberg v. *S.E. Nichols, Inc.*, Civ. No. 78-2613 (D.N.J. Jan. 15, 1979) 2

J. P. Stevens & Co. v. *NLRB*:
417 F.2d 533 (5th Cir. 1969) 15, 17, 18
380 F.2d 292 (2d Cir. 1967), cert. denied, 389 U.S. 1005 (1968) 15, 17

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) .. 13, 17-18

NLRB v. *Delchamps, Inc.*, 653 F.2d 225 (5th Cir.), reh'g denied, 660 F.2d 499 (5th Cir. 1981) 16

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 14

NLRB v. *Great Atlantic & Pacific Tea Co.*, 408 F.2d 374 (5th Cir. 1969) 16

NLRB v. *Jack La Lanne Management Corp.*, 539 F.2d 292 (2d Cir. 1976) 11

NLRB v. *J. H. Rutter-Rex Mfg.*, 396 U.S. 258 (1969) 18

NLRB v. *J. P. Stevens & Co.*:
380 F.2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967) 10, 11, 13
563 F.2d 8 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) 13

NLRB v. *Raytheon Co.*, 398 U.S. 25 (1970) 19

NLRB v. *S.E. Nichols of Ohio, Inc.*, 100 L.R.R.M. 2840 (D.C. Ohio 1978), aff'd, 592 F.2d 326 (6th Cir. 1979) .. 2

Cases—Continued:

	Page
258 N.L.R.B. 1 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 464 U.S. 914 (1983)	2, 11
NLRB v. *S.E. Nichols Shillington Corp.*, Civ. No. 75-1751 (3d Cir. Jan. 15, 1976)	2
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941)	14
S. E. Nichols Co., 156 N.L.R.B. 1201 (1966), enforced, 380 F.2d 438 (2d Cir. 1967)	2
S. E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977), enforced, No. 77-4154 (2d Cir. 1977)	2, 6
S. E. Nichols of Ohio, Inc., 195 N.L.R.B. 939, enforced, 472 F.2d 1228 (6th Cir. 1972)	2
S. E. Nichols Shillington Corp., 195 N.L.R.B. 189 (1972), enforced, 475 F.2d 1395 (3d Cir.), cert. denied, 414 U.S. 860 (1973)	2
S. E. Nichols-Dover, Inc.:	
159 N.L.R.B. 1071 (1966), enforced, 374 F.2d 115 (3d Cir. 1967)	2
165 N.L.R.B. 924 (1967)	2
167 N.L.R.B. 832 (1967), enforced, 414 F.2d 561 (3d Cir. 1969), cert. denied, 397 U.S. 916 (1970)	2
179 N.L.R.B. 249 (1969), enforced, 73 L.R.R.M. 2816 (3d Cir.), cert. denied, 400 U.S. 831 (1970)	2
United Aircraft Corp. v. *NLRB*, 440 F.2d 85 (2d Cir. 1971)	11
United Steelworkers v. *NLRB (Florida Steel Corp.)*, 646 F.2d 616 (D.C. Cir. 1981)	13, 16, 17, 18
Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533 (1943)	14

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	7, 8
§ 8(a)(3), 29 U.S.C. 158(a)(3)	7, 8
§ 8(a)(4), 29 U.S.C. 158(a)(4)	8
§ 10(c), 29 U.S.C. 160(c)	14
§ 10(j), 29 U.S.C. 160(j)	2, 14

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1779

S.E. NICHOLS, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 862 F.2d 952. The decision and order of the National Labor Relations Board (Pet. App. 1c-75c), including the decision of the administrative law judge (Pet. App. 1d-285d), are reported at 284 N.L.R.B. No. 55.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1989. The petition for a writ of certiorari was filed on April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, S.E. Nichols, Inc., operates a chain of some 40 discount retail department stores in a number of

states. Five of petitioner's stores in upstate New York (Herkimer, Marcy, New Hartford, Gloversville, and Amsterdam) and three stores in Ohio (Wooster, Ashtabula, and New Philadelphia) are supervised by District Supervisor Henry Korcz. Pet. App. 4a, 6a, 35c & n.13. The Herkimer, Marcy, and New Hartford stores are within 13 miles of each other (*id.* at 44a). Labor policy in all of petitioner's stores is determined and directed by petitioner's president, Manfred Brecker, at corporate headquarters in New York City (*id.* at 44a, 246d). Petitioner has a long history of using unlawful means to resist unionization of its stores (*id.* at 4a, 29c and n.11).[1]

In August 1979,[2] four employees of petitioner's Herkimer store—Dorothy Reinhardt, Doug Vincent,

---

[1] See *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), enforced by consent judgment, No. 77-4154 (2d Cir. 1977); *S. E. Nichols Co.*, 156 N.L.R.B. 1201 (1966), enforced in relevant part, 380 F.2d 438 (2d Cir. 1967); *S.E. Nichols-Dover, Inc.*, 159 N.L.R.B. 1071 (1966), enforced, 374 F.2d 115 (3d Cir. 1967); 165 N.L.R.B. 924 (1967); 167 N.L.R.B. 832 (1967), enforced, 414 F.2d 561 (3d Cir. 1969), cert. denied, 397 U.S. 916 (1970); 179 N.L.R.B. 249 (1969), enforced, 73 L.R.R.M. 2816 (3d Cir.), cert. denied, 400 U.S. 831 (1970); *S. E. Nichols of Ohio, Inc.*, 195 N.L.R.B. 939, enforced, 472 F.2d 1228 (6th Cir. 1972); *NLRB* v. *S.E. Nichols of Ohio, Inc.*, 100 L.R.R.M. 2840 (D.C. Ohio 1978), aff'd, 592 F.2d 326 (6th Cir. 1979) (civil contempt); 258 N.L.R.B. 1 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 464 U.S. 914 (1983); *S. E. Nichols Shillington Corp.*, 195 N.L.R.B. 189 (1972), enforced, 475 F.2d 1395 (3d Cir.), cert. denied, 414 U.S. 860 (1973). Unreported cases include: *NLRB* v. *S.E. Nichols Shillington Corp.*, Civ. No. 75-1751 (3d Cir.) (contempt); *DeProspero* v. *S.E. Nichols Marcy Corp.*, No. 76 CV 5 (N.D.N.Y. 1976) (Section 10(j), 29 U.S.C. 160(j), injunction granted); *Eisenberg* v. *S.E. Nichols, Inc.*, Civ. No. 78-2613 (D.N.J. Jan. 15, 1979) (Section 10(j) injunction granted). Pet. App. 29c n.11.

[2] References are to 1979, until otherwise indicated.

Denise Styles, and Kristin Burkle—began an effort to secure union representation. On August 31, Reinhardt and Vincent contacted the Union,[3] received blank authorization cards, and started to collect signatures. Within two days, the four employees had obtained signed cards from about 27 of the store's 70 employees; in many cases, the cards were signed in or near the store. Pet. App. 5a-6a, 15d-21d.

District supervisor Korcz knew of the organizing activity almost immediately, and came to the Herkimer store two days after the campaign started. The next day he told Reinhardt that she was discharged, handed her an already prepared final paycheck, and said that, if she had any questions, she should call President Brecker or a company vice-president.[4] That evening, Korcz discharged Vincent in the same manner. On September 4, the store manager received a mailgram from the Union claiming majority representation and requesting a card check. Later that day, he summarily discharged Burkle and Styles. Pet. App. 6a-7a, 21d-24d.

Immediately after receipt of the Union's request, Korcz initiated a series of daily meetings with employees in which management aggressively opposed unionization (Pet. App. 33d-34d). In the course of the meetings, Korcz stated that Reinhardt, Vincent, Styles, and Burkle "had been fired for not doing their jobs and not cooperating with management," that they "were passing out [union] cards," that he "didn't want them harassing people in the store

---

[3] Retail Store Employees' Union Local 345, United Food and Commercial Workers International Union, AFL-CIO.

[4] Shortly thereafter, an employee asked a supervisor if Reinhardt had been discharged for union activity. The supervisor replied that he "couldn't say," but added that "there would be more to go, it wasn't the end" (Pet. App. 73d-74d).

while they were working," and that the harassment consisted of "[t]rying to get people to sign union cards" (*ibid.*). When asked if they would be reinstated, Korcz answered "[Y]es, but once they're reinstated they don't last too long," thus indicating that pretexts would be found for their later discharge (*id.* at 7a, 99d-100d). Korcz repeatedly advised employees to report "harassment" or "trouble" or if anyone bothered them by trying to get them to sign union cards, and told employees that petitioner's attorney would help the employees with respect to union harassment. Korcz volunteered the information that employees could retract their union authorization cards, and offered to tell them where to send their retractions. He advised employees to let other people know that they had retracted their cards, and said that petitioner's attorney could "receive the union cards." *Id.* at 86d-87d, 97d.

At a September 4 meeting, Korcz announced that new work schedules to which employees had objected would not be put into effect (Pet. App. 75d). At various meetings, he solicited employee suggestions and complaints, and promised to rectify them. Some employee complaints were remedied immediately. The employees were told, however, that if the Union came in, they would have to start all over, and existing benefits could be lost (*id.* at 93d-95d).

On September 7, the Union filed an unfair labor practice charge, alleging that petitioner had violated the National Labor Relations Act (Act) by its discharge of the four union activists, by Korcz's conduct in the employee meetings, and by a rule restricting the acceptance of literature on company property. A complaint issued, and hearings were held in March 1980,[5] in which employees

[5] Further references are to 1980, unless otherwise indicated.

June Klimacek, Fred Pumilio, and Margaret Goldsmith testified under subpoena from the National Labor Relations Board (Board) (Pet. App. 8a, 187d, 205d, 220d). After they testified, all three were subjected to unprecedented scrutiny and harassment by Korcz and their store manager (*id.* at 8a, 187d-231d). Klimacek and Pumilio were given written warnings about their behavior. Goldsmith, an employee with an unblemished record, was denied a promised raise and was advised by President Brecker to "ask the Union to give [her] a raise" (*id.* at 9a, 204d-205d, 213d-216d).

On April 2, President Brecker paid an unusual visit to the Herkimer store and conducted the first of a series of meetings to discourage employees from supporting the Union (Pet. App. 9a, 16c-17c, 155d-183d). At meetings in April, May, and June, with Korcz in attendance, Brecker told employees that "there would be no way in hell that [Reinhardt, Vincent, Styles, and Burkle] would ever come back and work" in his store; that "hell would have to freeze over before [they] would get hired again"; and that he "would not reinstate people that participated in Union activities" (*id.* at 10a, 162d-163d). Brecker added that "some of these cases will go to court for eight to ten years" and that he would "keep appealing them until they get to the highest court" (*id.* at 163d). Referring to events at the store in Marcy, Brecker said that, when petitioner was forced to reinstate employees discharged for union activity, they did not last "because people don't get along with them and I consider them troublemakers and then they leave" (*id.* at 164d).[6] At a meeting in late April, Korcz read

[6] Brecker told employees that the Board was "working for the unions," and that, if the Union won, the Board would not and could not protect the employees. He said that petitioner might lose some cases before the Board, but ultimately it won its "big" cases in the

a letter from the Union stating that petitioner was continuing to use the same scare "tactics" at the Herkimer store that it had used to defeat another union at its store in Marcy. Korcz then said that the Union's statement was correct. *Id.* at 18c, 173d-174d.[7]

The Union filed additional unfair labor practice charges against petitioner, and a second complaint was issued on May 8, alleging, inter alia, unlawful discrimination against Klimacek, Pumilio, and Goldsmith, the employees who had testified before the Board (Pet. App. 4d). At a store-wide meeting on June 5, less than two weeks before the scheduled election on the Union's representation petition, Brecker announced the award of a $2,000 bonus to be distributed among employees and supervisors. The award was not issued pursuant to any written policy statement or established criteria, and no such bonus had ever been granted before at the Herkimer store (*id.* at 183d-184d). Brecker then read aloud from the Board's second complaint and, in an atmosphere of "manipulated hilarity," asked Klimacek, Pumilio, and Goldsmith to respond in the presence of their fellow employees to allegations in the complaint. *Id.* at 22c n.7, 159d-160d.

---

courts, a message that was repeated by both Brecker and Korcz in subsequent meetings (Pet. App. 158d, 165d-166d).

[7] The Board had found that petitioner violated the Act at its Marcy store by discharging ten employees who engaged in union activity; coercively interrogating employees; soliciting employees to engage in surveillance of other employees, circulate an anti-union petition, and retract authorization cards; promising rewards and improved benefits and working conditions; threatening to discharge employees and discover the identity of employees who signed authorization cards; issuing written warnings for minor infractions; and imposing economic reprisals. *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), enforced by consent judgment, No. 77-4154 (2d Cir. 1977). Korcz, who was then manager of the Marcy store, was an active participant in the violations. 229 N.L.R.B. at 77-89.

The Union lost the representation election on June 18 by a vote of 47 to 9 (Pet. App. 5d).

2. The Board adopted, with a few exceptions, the findings and conclusions of the administrative law judge (ALJ) as to petitioner's violations of the Act. The Board found that petitioner, acting primarily through Brecker and Korcz, violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening employees with loss of employment, benefits, and other reprisals if they supported the Union; soliciting employee complaints and grievances, remedying some grievances, and promising to remedy others; promising employees wage increases and other benefits to discourage support for the Union and granting an unprecedented bonus to the same end; soliciting employees to withdraw their union authorization cards; stating that it could learn the identity of employees who signed union cards; telling employees that discriminatorily discharged employees would not be reinstated or that, if reinstated, they would not remain employed; maintaining and enforcing overly broad no-solicitation and no-distribution rules; and discriminatorily restricting distribution and solicitation on behalf of the Union. The Board further found that petitioner violated Section 8(a)(1) by telling employees that union activists had been discharged for engaging in protected activities; expressing approval of its conduct at the Marcy store (conduct that had been found to be unlawful) and threatening to engage in similar conduct at Herkimer; soliciting employees to inform petitioner of protected activities; and discouraging cooperation with the Board and use of the Board's processes. Pet. App. 2c-3c, 36c-40c, 232d-234d.

In addition, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging Reinhardt, Vincent, Styles, and Burkle because of their

union activities (Pet. App. 2c-3c, 25d-70d), and Section 8(a)(3), (4) and (1) by withholding a wage increase from Goldsmith, giving Pumilio and Klimacek written warnings, and subjecting all three to more onerous working conditions, increased supervision, and embarrassment and ridicule because they testified in a Board proceeding or supported the Union (Pet. App. 2c-3c, 187d-231d).

As a remedy, the Board issued a broad order, directing petitioner to cease and desist from the violations found and from interfering with its employees' rights to organize "[i]n any other manner." Affirmatively, the Board directed petitioner to remove the overly broad no-solicitation and no-distribution rules from its employee handbook; to offer reinstatement to the discriminatorily discharged employees; to expunge from its records all references to the discriminatory discharges and warnings; and to make all of the discriminatees whole with respect to backpay, wages, and other benefits (Pet. App. 36c-43c).

The Board, with then-Chairman Dotson dissenting, agreed with the ALJ that additional notice and access remedies were required to dissipate the coercive effects of petitioner's unfair labor practices.[8] It noted petitioner's

---

[8] The ALJ had noted that "*all* the union instigators were discharged immediately upon the initiation of the organizational campaign," that petitioner had been found guilty of similar misconduct in the past, had been found in contempt of the reinstatement orders as to two employees discharged from its New Philadelphia store for union activity, and had previously engaged in almost "every type of unfair labor practice found" in the Herkimer case (Pet. App. 245d-246d (emphasis in original)). The ALJ rejected petitioner's contention that it should not be subjected to extraordinary remedies because it "has been involved in violations at '*only* a *half-dozen locations* over a *period of fourteen years*' " (*id.* at 248d (emphasis in original)). She observed that "[s]o far as appears, these are the only locations at which union campaigns have initiated. * * * If the past holds any lessons, it might

prior history of unlawful opposition to union activity, affecting five other stores in the 16-year period preceding the effort to organize the Herkimer store, and, in all but one case, involving the participation of President Brecker (Pet. App. 28c-33c, 35c n.13). The Board found that the ALJ was justified in characterizing petitioner "as a 'recidivist' who has at the Herkimer store continued to engage in an 'obdurate flouting of the Act,' " and adopted her conclusion that "extraordinary notice and access remedies are necessary to 'clear the atmosphere poisoned by [petitioner's] unrelenting, egregious and pervasive trampling on its employees' statutory rights' " (*id.* at 33c-34c).

However, the Board disagreed with the ALJ that the extraordinary access and notice remedies should be applied at all of petitioner's stores. Rather, the Board concluded that applying them to the eight stores in the district supervised by Korcz would adequately effectuate the policies of the Act. The Board noted that President Brecker had personally participated in earlier unfair labor practices at "two of [the stores] located in District Supervisor Korcz's district, and Korcz joined him at one of them" (Pet. App. 35c n.13).

Accordingly, the Board ordered petitioner to post for 60 days at the stores in Korcz's district an appropriate notice signed by Brecker, Korcz, and the manager of the particular store, and to mail to employees of those stores a copy of the notice together with an explanatory letter signed by Brecker and the store manager; to give each supervisor at its Herkimer, Marcy, and New Hartford

---

teach employees and unions that any attempt by Nichols' employees to exercise their freedom to make a choice contrary to [petitioner's] desires will be both hazardous and doomed to failure, at least without long and tortuous litigation, which, as the present case shows, may itself pose danger for the employees" (*id.* at 248d-249d).

stores a copy of the notice, with instructions, signed by the store manager, to comply with the provisions of the notice; and to convene, during working time, all its employees at each store in Korcz's district and the supervisors at the Herkimer store and have President Brecker read the notice to them. Pet. App. 44c-47c.

In addition to the notice requirements, the Board's order requires petitioner, on request by a union made within two years of the order, to give the union reasonable access to company bulletin boards for a period of one year. During the same two-year period, the order requires petitioner (1) to grant a union equal time if store employees are convened for an address on union representation, and rebuttal time, if requested; (2) if there is a Board election, to allow the participating union to make one 30-minute pre-election speech during working hours; and (3) on request of a union conducting an organizing campaign, to furnish the union with a current and periodically updated list of employees' names, addresses, and classifications. Pet. App. 47c-49c.

3. The court of appeals upheld the Board's unfair labor practice findings and, with one modification, enforced its remedial order.[9]

---

[9] The modification concerned the requirement that Brecker read the notice aloud, a requirement that "was designed to 'undo the effect' of numerous and egregious unfair labor practices by assuring employees that the company will respect the rights of workers to form and join unions," and to "insure[] that the full counteracting force of the remedial order will be felt by the employees" (Pet. App. 51a). The court noted, however, that it had previously held, in *NLRB* v. *J. P. Stevens & Co.*, 380 F.2d 292, 304 (2d Cir.), cert. denied, 389 U.S. 1005 (1967), that there is "an element * * * of some humiliation in having Company officials personally and publicly participate." The court, accordingly, limited the reading requirement to the Herkimer store, where the most recent violations had occurred, and required the Board to give petitioner the option of having the notice read by a Board

The court rejected petitioner's challenge to expansion of the order beyond the Herkimer store to the eight stores supervised by Korcz. The court noted that in its own prior decisions upholding the Board's discretion to expand its remedies beyond the actual locations where unfair labor practices were committed,[10] it had considered "whether the employer has repeatedly shown anti-union animus on a broad scale" and whether, as in this case, "a company's labor policies are determined at a central location rather than at each individual workplace" (Pet. App. 41a-42a). The court took judicial notice, as the Board had done, of the many cases finding that petitioner had violated the Act in its opposition to organizing activity, and had done so whenever such activity had occurred.[11] It concluded that "[t]his history almost certainly indicates a general knowledge by the company's employees that it is willing and likely to engage in coercive activity in response to union campaigns in its stores" (*id.* at 43a).[12]

---

agent. But it added that it was not holding that the Board's reading requirement " 'would never be appropriate.' * * * We simply hold that it is not called for in the circumstances here." Pet. App. 51a-53a.

[10] *NLRB* v. *Jack La Lanne Management Corp.*, 539 F.2d 292, 295 (2d Cir. 1976); *United Aircraft Corp.* v. *NLRB*, 440 F.2d 85, 100 (2d Cir. 1971); *J. P. Stevens & Co.*, 380 F.2d at 304.

[11] The court observed that in *S. E. Nichols of Ohio, Inc.*, 258 N.L.R.B. 1 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 464 U.S. 914 (1983) (involving petitioner's New Philadelphia store), the Board had noted petitioner's "clear 'disregard for the rights of its employees and its contempt for' the Act, the Board and the Sixth Circuit", and had stated that petitioner's "history of committing unfair labor practices 'clearly demonstrates' that over a 15-year period the company had 'uniformly committed unlawful acts in response to attempts to organize [its] stores' " (Pet. App. 43a).

[12] The court drew support for that conclusion from the fact that the eight stores affected by the Board's order are all in New York and

The court found substantial record evidence of a "conscious corporate-wide policy to coerce company employees in the exercise of their right to join or form labor unions, at least in the area subject to the jurisdiction of district supervisor Korcz."[13] It held that "on this record, * * * the Board had discretion to select remedies coextensive with that [unlawful] company policy, * * * and to impose district-wide access and notice requirements * * * in order to remedy the chilling effect of the company-produced coercive atmosphere" (Pet. App. 46a-47a).

Turning to petitioner's objections to the access remedies, the court observed "that an extensive campaign of unfair labor practices can produce effects on employees that cannot be offset by * * * conventional remedies," and that "[t]o offset the effects of such unfair labor practices, * * * it has been found necessary in some cases to grant a union access to company bulletin boards or to the plant

---

Ohio; that the Herkimer, Marcy, and New Hartford stores are within 13 miles of one another, and that both bargaining unit and management employees had moved between stores in the district (Pet. App. 44a).

[13] The court found it "very important" that the "people responsible for managing the stores at the district-wide level were the individuals most culpable for the findings of violations at Herkimer" (Pet. App. 45a). Thus, the court said, Korcz "participated directly, personally and repeatedly in the unfair labor practices at the Herkimer store" and told the Herkimer employees that, in opposing unionization, petitioner would repeat its conduct at the Marcy store, "even though Korcz knew the conduct was unlawful" (*ibid.*). For his part, Brecker, who had previously participated in unfair labor practices at two stores located in the district, "repeatedly and unrelentingly attacked the Board's neutrality and openly disparaged those employees who had testified on behalf of the Board. He also used coercive tactics such as stating, in effect, that reinstated union adherents do not last very long in the company's employ" (*id.* at 46a).

itself" (Pet. App. 48a).[14] The court held that on this record the Board reasonably found such remedies necessary to effectuate the purposes of the Act. Rejecting petitioner's argument that the Board had made no finding that it had restricted union access, the court said that petitioner did "interfere directly" with union access by "firing the union activists * * * who were in fact acting as conduits of union information." *Id.* at 49a-50a.

The court distinguished this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), relied on by petitioner for the proposition that its property rights precluded access unless the Union had no other reasonable means of reaching the employees. The court found *Babcock & Wilcox* "inapposite because it does not deal with the remedial powers of the Board; it only seeks to determine when an employer's denial of access to his property can itself be deemed an unfair labor practice" (Pet. App. 50a-51a).

Finally, the court rejected petitioner's contention that the order should not be enforced because of the time lapse between the ALJ's decision and the Board's order, some of which the court attributed to petitioner's "massive attack on the ALJ's decision." Although "troubled by this delay," the court did not believe that it justified a refusal to "insure the company's employees the right to participate freely in union activities" and "to remedy the effect of the company's past unfair labor practices by restoring, as much as possible, the status quo that existed at the time the practices occurred" (Pet. App. 54a-56a).

---

[14] Citing *United Steelworkers* v. *NLRB (Florida Steel Corp.)*, 646 F.2d 616, 634-635 (D.C. Cir. 1981); *NLRB* v. *J. P. Stevens & Co.*, 563 F.2d 8, 24-25 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

ARGUMENT

1. Petitioner does not challenge the Board's findings, upheld by the court of appeals, that, in opposing the Union organizational campaign, it engaged in pervasive and egregious violations of the Act, with its president and the supervisor of the stores affected by the order as the most culpable participants.[15] Nor does petitioner argue that the Board lacks the power in appropriate cases to devise extraordinary remedial measures.[16] Indeed, petitioner acknowledges (Pet. 8-10, 14) that notice and posting requirements beyond the store where the unfair labor practices occurred may be appropriate where those prac-

---

[15] While petitioner does not directly challenge the Board's unfair labor practice determinations, it asserts (Pet. 7) that the district court's denial of interim injunctive relief under Section 10(j) of the Act, 29 U.S.C. 160(j)—on the ground that there was not reasonable cause to believe that the unfair labor practices charged in the second complaint had occurred (Pet. App. 18a-19a, 4d-5d)—undercuts the propriety of the Board's multi-site remedial order. As the court of appeals properly noted (*id.* at 12a, 17a-20a), findings made on an application for a preliminary injunction under Section 10(j) are not determinative of the merits in a subsequent unfair labor practice proceeding.

[16] Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to enter an order requiring the respondent not only "to cease and desist from such unfair labor practice," but "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]." "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539 (1943). Accord, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941). Moreover, "[i]n fashioning its remedies * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

tices may cause a chilling effect on labor relations at other locations,[17] and that access requirements may be appropriate where the unfair labor practices create communication problems for the union.[18] Petitioner simply contends (Pet. 6-7) that the notice and access remedies upheld by the court of appeals were unwarranted in this case. That fact-specific claim raises no issue appropriate for review by this Court.

2. In any event, there is no merit to petitioner's contentions.

a. Petitioner contends (Pet. 9) that the Board's district-wide posting and mailing remedy is inappropriate because the violations were limited to the Herkimer store, the stores in the division are geographically remote and unrelated, previous unfair labor practices were unrelated to and not concurrent with the Herkimer violations, and there were no findings that "any of the alleged violations became known outside of the stores in which they purportedly occurred or that they created a 'chilling effect' at other locations." However, the court of appeals found that petitioner's 15-year history of unlawful acts in response to union activity "almost certainly indicates a general knowledge by the company's employees that it is willing and likely to engage in coercive activity in response to union campaigns in its stores" (Pet. App. 43a). The court further found that there was substantial record evidence of a "conscious corporate-wide policy to coerce company employees * * *, at least in the area subject to [Korcz's] jurisdiction," and that in that district there was a need to counter "the chilling effect of the company-

[17] See, *e.g.*, *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969); *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2d Cir. 1967).

[18] See, *e.g.*, *J. P. Stevens & Co.*, 417 F.2d at 540-541.

produced coercive atmosphere" (*id.* at 46a-47a). Moreover, contrary to petitioner's assertion (Pet. 9), the Board, upheld by the court of appeals, found that there was employee interchange between stores in the district (Pet. App. 44a).

In these circumstances, the facts justifying the division-wide posting and mailing remedies ordered in this case fit comfortably within the scope of cases where such remedies have previously been approved,[19] and are distinguishable from cases in which such remedies have been found inappropriate.[20]

---

[19] See, *e.g.*, *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 408 F.2d 374, 376 (5th Cir. 1969) (Pet. 8) (assumption that employees at other stores knew of company's interference at one store is "particularly reasonable" in that they shared a common supervisor); *NLRB* v. *Delchamps, Inc.*, 653 F.2d 225, 228-229 (5th Cir.), reh'g denied, 660 F.2d 499 (5th Cir. 1981) (Pet. 8) (although unfair labor practices implicated only local management at three stores, mingling of employees at lunch and dinner meetings justified posting at 17 area stores). Petitioner's contention (Pet. 11) that the Board and the court of appeals inappropriately relied on cases involving J. P. Stevens in ordering multi-site remedial relief only quarrels with the finding that here, as in those cases, there was reason to anticipate that the employer would continue to pursue the same policies and that employees in other facilities would know of, and be chilled by, the unfair labor practices that had occurred. See notes 9, 13, *supra*. Moreover, the Board did recognize a distinction between the *J. P. Stevens* cases and this case by restricting its remedy to eight of petitioner's 43 stores. These eight stores fell within a defined geographical area and under the jurisdiction of a single and particularly culpable supervisor.

[20] In *United Steelworkers* v. *NLRB*, 646 F.2d 616 (D.C. Cir. 1981) (which petitioner cites as *Florida Steel Corp.* v. *NLRB*) (Pet. 9-10), the court of appeals remanded to the Board for further consideration of the necessity for corporate-wide union access as a remedy for "a relatively minor violation" involving a single plant (646 F.2d a at 619, 624). It did so because the Board had made no finding that it was "reasonably foreseeable" that employees at other plants had "suffered

b. Relying on decisions of the Courts of Appeals for the Fifth and District of Columbia Circuits (Pet. 13), petitioner suggests that a requirement that the notice be read aloud is appropriate only to "insure the notice's full dissemination" in the face of illiteracy. Subsequent cases in both circuits make clear that reading requirements fall within the range of the Board's remedial discretion when employers conduct antiunion campaigns in a clearly unlawful manner, and that the illiteracy of the workers receiving the notice is by no means the only justification for such remedial provisions. See *Conair Corp.* v. *NLRB*, 721 F.2d 1355, 1385 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984); *J. P. Stevens & Co.* v. *NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969). See also, *J. P. Stevens & Co.* v. *NLRB*, 380 F.2d 292, 304-305 (2d Cir. 1967), cert. denied, 389 U.S. 1005 (1968).

c. Similarly, petitioner's contention (Pet. 13-14) that the Board's access remedies are unwarranted here because the unions have easy access to the employees, merely quarrels with the Board's finding, upheld by the court of appeals, that petitioner "did interfere directly with * * * access by firing the union activists at the Herkimer store, who were in fact acting as conduits of union information" (Pet. App. 49a-50a). See *J. P. Stevens & Co.*, 417 F.2d at 540-541 ("But how to communicate when history proves that identifiable activity imperils the job of the actor?").

Petitioner's contention (Pet. 15-16) that the access remedies conflict with this Court's decision in *NLRB* v.

---

coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects," and because the court itself "simply [could] not assume from the evidence in this record that the conduct of Florida Steel has had a corporatewide chilling effect upon employees" (*id.* at 641).

Babcock & Wilcox, 351 U.S. 105, 114 (1956), is without merit. As the court of appeals noted (Pet. App. 50a), in *Babcock & Wilcox* this Court was not concerned with the Board's remedial authority, but with the circumstances in which a denial of access to company property can itself be deemed to be a violation of the Act. In this case, petitioner engaged in pervasive violations of the Act, some of which "did interfere directly" with the union's access to petitioner's employees (*id.* at 48a-50a). The cases cited by petitioner, *e.g.*, *United Steelworkers* v. *NLRB*, 646 F.2d 616, 637-638 (D.C. Cir. 1981) (Pet. 9-10); *J. P. Stevens & Co.* v. *NLRB*, 417 F.2d at 540 (Pet. 8); *Decaturville Sportswear Co.* v. *NLRB*, 406 F.2d 886, 889 (6th Cir. 1969) (Pet. 8, 9), confirm the Board's discretion to remedy such violations by providing access remedies similar to those granted here, without a finding that the Union will be unable to reach the employees through other available means of communication.

d. Finally, there is no merit to petitioner's contention (Pet. 16-19) that the Board's order is inappropriate because of the six and one-half year passage of time between the ALJ's decision and the Board's order. This Court has made clear that the burden of delay, either by the employer or the Board, may not be shifted to innocent employees who are the beneficiaries of the Board's remedial order. *NLRB* v. *J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 265-266 (1969).[21]

---

[21] As the court of appeals noted, some of the delay was attributable to petitioner (Pet. App. 54a). Moreover, in light of petitioner's statements to employees that it could delay Board proceedings to their disadvantage, p. 5, *supra*, it is not clear that the delay worked to the disadvantage of petitioner. Petitioner's reliance (Pet. 17) on Second Circuit cases involving bargaining orders is inapposite. As the court of appeals observed (Pet. App. 56a), the remedy here does not require imposing representation on employees who may no longer want it.

Petitioner further asserts (Pet. 18) that the absence of unfair labor practice charges filed against it in over eight years is evidence of its "harmonious labor relations," making the need for a remedial order moot at this time. However, as the ALJ stated, (see note 8, *supra*), petitioner's unlawful conduct appears to have been coextensive with union organizational attempts at its stores. The court of appeals agreed, finding that petitioner has " 'uniformly committed unlawful acts in response to attempts to organize [its] stores' " (Pet. App. 43a). In these circumstances, the court of appeals appropriately found that the passage of time did not diminish the need for the remedial relief ordered by the Board, as modified by the court of appeals (see note 9, *supra*).[22]

[22] The court of appeals' decision is consistent with *NLRB* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970) (Pet. 18). There the Court rejected a claim of mootness but recognized that there might be "situations where an enforcement proceeding will become moot because a party can establish that 'there will be no reasonable expectation that the wrong will be repeated.' " The court of appeals here properly found that, in view of petitioner's past history of opposing union organizational efforts whenever they occurred, there was no reasonable expectation that the wrong would not be repeated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney

MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989 - 241 699/00257